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CRIMINAL JUSTICE ACT REVISION OF 1985

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HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

FIRST SESSION

ON

H.R. 3004

CRIMINAL JUSTICE ACT REVISION OF 1985

JULY 25, 1985

Serial No. 41

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CONTENTS

WITNESSES

	Page
Hon. Thomas J. MacBride, U.S. district judge for the eastern district of California, chairman of the U.S. Judicial Conference Committee to Implement the Criminal Justice Act, accompanied by Theodore J. Lidz	2
Prepared statement	13
Roland E. Dahlin, Federal, Public, and Community Defenders, and Bonnie Brigance Leadbetter, Esq., the National Legal Aid and Defender Association	48
Prepared statement	51
Bonnie Brigance Leadbetter, prepared statement	66

ADDITIONAL MATERIALS

Statement of Hon. Carlos J. Moorhead	43

APPENDIXES

APPENDIX 1—LEGISLATIVE MATERIALS

A. H.R. 3004, as introduced July 16, 1985	76
B. H.R. 3004, as reported December 5, 1985	88
C. House Report 99-417, to accompany H.R. 3004, filed December 5, 1985	100
D. Debate on H.R. 3004, U.S. House of Representatives, Vol. 131, Cong. Record No. 169, December 9, 1985, H 11393-96	129

APPENDIX 2—ADMINISTRATIVE OFFICE OF THE U.S. COURTS

A. Letter from William James Weller (legislative affairs officer, Administrative Office of the U.S. Courts) to Hon. Peter W. Rodino, Jr., dated April 18, 1985	133
B. Letter from Hon. Thomas P. O'Neill, Jr. (Speaker of the House), from Joseph F. Spaniol, Jr. (Deputy Director, Administrative Office of the U.S. Courts), dated April 18, 1985, with attachments	134

APPENDIX 3—ADDITIONAL CORRESPONDENCE

A. Letter from Earl J. Silbert (president, the National Association of Former U.S. Attorneys) to Hon. Robert W. Kastenmeier, dated August 26, 1985	166
B. Letter from Robert D. Evans (director, Governmental Affairs Group, American Bar Association) to Hon. Robert W. Kastenmeier, dated September 27, 1985, with attachments	171

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CRIMINAL JUSTICE ACT REVISION OF 1985

THURSDAY, JULY 25, 1985

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to call, at 10:11 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Morrison, Berman, and Coble.

Staff present: Michael J. Remington, chief counsel; Gail Higgins Fogarty, counsel; Thomas E. Mooney, associate counsel; and Audrey Marcus, clerk.

Mr. KASTENMEIER. The subcommittee will come to order.

Today the Subcommittee on Courts, Civil Liberties, and the Administration of Justice will conduct a hearing on H.R. 3004, the Criminal Justice Act Revision of 1985. This act would provide for the representation of criminal defendants, material witnesses, and others in Federal court when the defendants and others cannot afford to pay for such representation.

I am pleased that the gentleman from California, the ranking minority member of the subcommittee, Mr. Moorhead, has joined me in cosponsoring the legislation, which was introduced at the request of the Judicial Conference of the United States. It is primarily an updated version of H.R. 4307, which was processed in part last year.

We are convinced that the legislation will help ensure that the constitutional mandates for effective assistance of counsel are met and will improve the administration of justice.

Our first witness today will be the Honorable Thomas J. MacBride, who is a U.S. district judge for the Eastern District of California, and who has served in the past as chief judge of that district. Judge MacBride is representing the Judicial Conference Committee to Implement the Criminal Justice Act. The judge has testified during the 98th Congress on the Criminal Justice Act revision bill.

We are very pleased to greet you back. Justice MacBride, I should personally say, is an old friend.

Mr. MACBRIDE. Thank you very much, Mr. Chairman.

Mr. KASTENMEIER. I guess I am only sorry that more members of the judiciary could not hear the colloquys preceding this hearing, which would suggest that respect for the Federal judiciary is not

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absolute within the Congress. That is a regrettable case, I would say. But at least I think, Judge MacBride, you heard a number of complaints in connection with court decisions that some of our colleagues have which they attribute to the Federal judiciary rather than, I would properly say, an appropriate rendering of the laws of this country.

In any event, we are very pleased to greet you here today on a different mission.

Mr. MACBRIDE. Thank you, Mr. Chairman. May I say on my own behalf that I don't recall that any of the decisions that I have handed down have been criticized by Congress so far. I have been on for 23 years, going on 24, and I hope that in the twilight years of my career I won't make any mistakes that will come to the attention of Congress.

STATEMENT OF HON. THOMAS J. MacBRIDE, U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF CALIFORNIA, CHAIRMAN OF THE U.S. JUDICIAL CONFERENCE COMMITTEE TO IMPLEMENT THE CRIMINAL JUSTICE ACT, ACCOMPANIED BY THEODORE J. LIDZ

Mr. MACBRIDE. I do appreciate your inviting me here today to go over this bill. As you stated at the beginning, Mr. Chairman, this is somewhat of a rehash of H.R. 4307 of last year, which was passed unanimously out of your subcommittee and out of the Judiciary Committee and without objection out of the House itself and went to the Senate, where no action was taken, unfortunately, by reason of, I would say, some complications with a bill coming over from the Senate side.

Nevertheless, we did get some relief last year by reason of the Comprehensive Crime Control Act of 1984 [CCCA], where the rates were raised and doubled. That is, they were raised from $20 an hour for out-of-court work to $40, and from $30 for in-court work to $60 an hour. However, as grand as that may seem, it was simply not sufficient to meet the problem with which we are confronted in our Federal courts and particularly in connection with implementing the Criminal Justice Act.

Mr. KASTENMEIER. May I say that I take you are not proceeding exclusively from your written statement?

Mr. MACBRIDE. I will try to follow my written statement——

Mr. KASTENMEIER. All right.

Mr. MACBRIDE. These are just preliminary remarks.

Mr. KASTENMEIER. The statement of 1982 is appended to it.

Mr. MACBRIDE. Yes. No, I am not going to give you that. I have got a new one, Mr. Chairman. This is my statement of 1985.

Accompanying me today is Mr. Ted Lidz, who is the chief of the Criminal Justice Act division of the Administrative Office of the U.S. Courts. He is on a day-to-day basis contact with all of the Federal defenders and those who are attempting to implement the act. He is in constant contact with the judges throughout the entire Federal judiciary who call in for explanation and for answers to questions that are constantly posed to them and with which they are constantly confronted. So, he is well qualified to be with me today to assist in my presentation in the event that I need it.

As you know, this bill was introduced at the request of the Judicial Conference. As you stated, Mr. Chairman, it follows those matters that were in H.R. 4307. As a matter of fact, it tracks H.R. 4307 from last year. But I think it necessary that I emphasize the need for the further implementation of the provisions in H.R. 4307 but left out of the CJA revision bill.

I might point out preliminarily those matters that were not covered by the bill that was passed by Congress, as part of the CCCA of 1984. First of all, the hourly rates, of course, were increased. The authority for hourly rate variations by the Judicial Conference that was provided for in H.R. 4307 was not addressed by the CCCA of 1984. Nor was the subsequent cost-of-living adjustments to hourly rates addressed. The case maximums were addressed, but they did not meet the provisions of H.R. 4307 inasmuch as they merely doubled the existing maximums, where we were asking for greater maximums than were provided by the CCCA.

The waiver of maximum amounts was not addressed. Mandatory representation for material witnesses in custody was not addressed. The H.R. 4307 formula for appointment of attorneys in petty offense cases where confinement is authorized was not addressed. Malpractice protection for Federal defenders was not deal with, nor was the funding for training of panel attorneys and others who might practice before the Federal court under the Criminal Justice Act. Also, the subject of certification for payment of defense fact witness fees was not addressed. I hope to address these subjects briefly in my remarks today.

Of course, the primary focus of our efforts is to adjust the hourly rate and compensation structure. Although the rates were increased, as I say, they are still not sufficient. By doubling them to $40 and $60 an hour, we are still met with the overhead problem for a great number of attorneys with the $40 an hour out-of-court rate. You have an attorney who has—and our research reflects that--in the larger communities, the overhead of an attorney runs around $39 an hour. And 75 percent of the hours that he spends under the Criminal Justice Act, which is reflected on the bill that he turns in is for out-of-court work. Therefore, he is only netting a dollar an hour on 75 percent of the time that he spends on a CJA case.

It is for this reason that we are asking that there be a flat rate of $50 straight across the board, without giving any consideration to whether it's out-of-court or in-court work and that he be given $50, a straight $50 an hour.

That may seem odd, that we would actually campaign to reduce the in-court pay from $60 down to $50 an hour, but the overall savings to the judiciary itself justifies, in part, the single rate. This savings would be achieved by avoiding having the pay that are turned in matched and examined against the court record by the clerk or the judge himself to determine whether or not the attorney did in fact spend the x number of hours in court or x number of hours out of court that he or she is claiming. The vouchers also have to be examined by the Administrative Office to be sure that the figures are correct. If a straight $50 an hour across the board rate is established, a considerable expenditure of judicial, court clerk and Administrative Office time will be eliminated. Inasmuch

as 75 percent of the attorney's time—his or her out-of-court hours—would be an increased $10 an hour above the current CCCA-rate for the same work, we feel that it is a fair adjustment. We have received no opposition to the proposal from any defender organization or panel attorneys.

Mr. KASTENMEIER. That is true, Judge MacBride, but would it also prove to be a disincentive for a defense attorney to go to try the case?

Mr. MACBRIDE. Well, as I say, because of the fact that 75 percent of this work is out of court, he is getting a 10-percent increase over what the statute now provides. So, actually it does amount to an increase. It will be an overall increase to an attorney, in the total compensation that he or she receives, for the average case that he or she tries.

Mr. KASTENMEIER. That's true, but you understand my point. My point being, up to a point that is true, but whether one comes to a point of pleading the defendant, there being no additional compensation for the difficult work of actually going into court—representing him in court—there may be in fact a disincentive to do that. The $60-$40 compensation is no longer——

Mr. MACBRIDE. Well, Mr. Chairman, as you know, there are so few criminal cases that go to court. In other words, most of it is done outside the courtroom without a jury, without a trial to the bench. It is the motions, investigation and the various proceedings that take place where you finally work a person down to the realization that there is no place to go except to accept a plea of guilty. And I am not talking about plea bargaining. It is the evidence that they have on the person by reason of a search warrant, statements of witnesses and codefendants and the like, the information that they develop on the defendant outside the courtroom, and, his background that bring the defendant to the realization that to try the case is a futile effort.

Therefore, it's this out-of-court work that the lawyer has done that brings up the total bill. As I say, 75 percent of that total bill is accredited to the out-of-court work and, therefore, the total compensation that the average attorney would receive by reason of establishing a flat $50 rate for both in- and out-of-court work will actually result in an increase of compensation to him.

The $50 across the board is the minimum that we would ask for in the bill, and it's provided for in the bill.

The bill also gives authority to the Judicial Conference to raise this rate to $75 in certain districts. At the present time, there are approximately 15 districts which we call high expense districts. Hawaii and Alaska are the most obvious examples where Congress has provided for COLA payments by reason of the cost of living comparisons between those 2 States and the other 48 States. Government employees enjoy a COLA advantage there. There are a total of 15 districts at the present time that we estimate would come in with a request for the equivalent of COLA type increase over and above the $50 starting rate.

I want to put a caveat on that statement. It doesn't mean that in every one of those 15 districts there is going to be an allowance of $75 an hour. First of all, the district would have to make a case for it. This would first be directed to the particular circuit judicial

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council. If the council approved it, it would then come to the Administrative Office and would be referred to Mr. Lidz' office He and his staff would consider it and make an appropriate investigation. He would then present the request and his recommendation to the Criminal Justice Act Committee of the Judicial Conference.

That committee would then have a hearing on the matter. We might hear witnesses on the matter. If we decide that there should be an increase over the $50 for the requesting district, we would recommend it to the Judicial Conference. The conference in turn would then have to make its decision as to whether or not they would accept our recommendation.

So, it isn't just a foregone conclusion that, once a district says it wants $60 or $75 instead of the $50, that they are going to get that. They have to run the gauntlet, so to speak, before any additional payment over the $50 would be granted.

In addition, H.R. 3004 provides that after a period of 3 years, the Judicial Conference would be permitted to grant a cost-of-living increase which would not exceed the Federal pay comparability increase on the rates that would be authorized. This was provided for last year. It was accepted by the committee and was passed by the House.

This means, that if there is a cost-of-living increase given to other Federal employees, then that same increase could be granted by the Judicial Conference to whatever rate was being paid at that time under the provisions of the act.

Mr. KASTENMEIER. If I may interrupt again. If you were under the $50 limit, would that be like to $55? Would it be to sort of the nearest $5 increment or something? You obviously wouldn't want to pay them $52.78 an hour rather than $50, presumably, or would you?

Mr. MACBRIDE. I am going to defer to Mr. Lidz on that.

Mr. KASTENMEIER. The reason I asked is simply——

Mr. MACBRIDE. How would you do it mechanically, Mr. Lidz?

Mr. KASTENMEIER [continuing]. The simple administration of the law judicially that is how it would work with respect to the implementation of COLA's.

Mr. LIDZ. Administratively, we would be interested in rounding it, Mr. Chairman. And also the bill would leave us the flexibility of deciding whether to grant it at the time of these comparability increases or to wait for a period of time until there was a sufficiently large one to warrant the additional administrative burden and adjusting the rates and changing guidelines, and so forth.

Mr. MACBRIDE. I might add that allowing the adjustment suggested, that is, the cost-of-living increase, is going to relieve Congress of the burden of having to change these rates. We went for so many years—from 1970 to 1984—without any increase at all, and we were constantly haranguing Congress to increase the rates. This would relieve you of that problem. In other words, these rates would just simply go up with the cost of living. As Mr. Lidz has pointed out, it would be done on a basis of accumulating it to the point where it would not be a ridiculous increase, but it would be, as you say, a $5 or $10 per hour increase.

Then the bill will also raise the overall case compensation maximums and then modify the standard for waiving it. Under the

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CCCA, the maximums were doubled. The old maximums, which had remained in effect since 1970, for 14 years, were doubled from $1,000 to $2,000 for a felony, $400 to $800 for a misdemeanor, $1,000 to $2,000 for an appeal, and $250 to $500 for other representation, such as for Federal habeas corpus, for parole hearings, and for other hearings where under the Constitution a person is entitled to representation.

We feel that those maximums are too low. Under the bill it is provided that the maximums for felonies should be raised to $5,000, for misdemeanors to $1,500, and $3,000 for appeals, and $1,000 for other representations provided for under the Criminal Justice Act. These are more realistic. It doesn't mean that in every instance they are going to be paid, and they aren't paid. As a matter of fact, the maximums that we have in the present bill are not always paid. The provisions of H.R. 3004 allow flexibility in dealing with the maximums, another reason for increasing the present maximums is to avoid the necessity of constantly having to submit to the chief judge of the circuit a bill that exceeds the maximum. In light of the fact that we are increasing the hourly rates we know the bills will be higher. The higher case compensation maximums will avoid the necessity of constantly taking the time of the chief judge of the circuit to consider and approve these claims that exceed the case maximums due to the number of hours claimed.

We feel that the proposed case maximums are not too high, that the presiding judge can keep the fees well within these maximums except in the few circumstances where justice and fair compensation require that an amount over the case maximum be approved by the chief judge of the circuit.

The other part of this provision of the bill deals with the matter of changing the circumstances under which these maximums can be exceeded by eliminating the present provisions of the statute which require that, in order to permit payment in excess of the maximums, the chief judge of the circuit and also the presiding judge at the particular case must find that the particular case was complex and extended. We are changing that language from complex and extended to fair compensation.

I think that is really what the statute originally intended, and that is that an attorney should receive fair compensation for the work that he provides.

Moreover, I think the concept of pro bono representation is no longer a viable concept.

Nowadays, with the complexity of practicing criminal law in the Federal court, they are specialists. There are only a few that can do it. They are entitled to fair compensation. To single them out of the entire bar, which would mean calling on a corporate lawyer or a real estate lawyer or the like, and ask him to come in and take on a criminal case, where he knows nothing about the Federal criminal law, and sometimes instead of coming himself, he's got to send over a junior lawyer in his office to represent the office, we find that that is not certainly what the statute intended. And I don't think that Congress intends that.

There are certain circumstances, for instance, where you could take—I would give you just one simple example. If you have a district where the hourly rate is $50 an hour and you have a misde-

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meanor case that takes 30 hours to prepare and try, the attorney would end up with a $1,500 bill, which is within the maximum limit. Take the identical case to be prepared and tried in one of these high-cost districts where the hourly rate is $75 an hour. When that person had spent 20 hours, he would have reached the existing maximum of $1,500. But to properly prepare and try the case he will be required to spend 30 hours, just like the other person in the lower rate district has. In that instance, the person in the higher rate district has given his services. He has done exactly the same job as the attorney in the lower rate district. Yet, by reason of the fact that he is claiming $2,250, he has to ask for excess compensation which under the present system may only be given when the case is "extended or complex."

There is no way you can justify such a representation on the basis of its being extended or complex, because it's no different than the other case. Yet, he should be paid. So, he should have fair compensation for what he has done as the bill would allow.

There are many cases where, simply by reason of the type of office the person has, the amount of work that he has put into the case, not necessarily the complexity of the case but the difficulty of the case—and I think there is a distinction that can be made between the two—the case is such that it cannot be identified as a "complex and extended" case. It's just an extremely difficult case where the man has put in a tremendous amount of work. Fair compensation would require that he be paid in excess of the maximums. Yet, the excess payment could not be justified under the language of "extended or complex."

We think that fair compensation is a more flexible and a more equitable standard to apply for waiver of the maximums.

The next matter I would like to get to discuss is investigative, expert and other services. The Criminal Justice Act at the present—and this, of course, was not addressed, as I stated previously, by the CCCA. The Criminal Justice Act at the present time limits payments for expert services that may be hired by an attorney without previously obtaining the consent of the judge to $150. There is no provision for nunc pro tunc authorization. If the attorney sees a problem, he immediately hires an investigator. The investigator runs up a bill of $300. Maybe he will hire a psychiatrist immediately for exigent reasons. He runs up a bill for $300 or $400. He comes before the court. The court says, I'm sorry, you did this without authority from me. And the young man says: "well, there was no opportunity for me to come in, the defendant was arrested on a weekend. I had to get on the case immediately. And I had to hire these investigators to get on the job, and the bill ran over the $150."

Under the present provisions of the act, there is no way that that young lawyer could be reimbursed for the excess expenditure that he has made for these expert services.

First of all, we are asking that, without prior authorization, an attorney be permitted to incur up to $300 for expert services. The present limitation of $150 has been on the books for 14 years since 1970. We know that in that 14 years the rates of investigators and psychiatrists and fingerprint experts and handwriting experts and the like have all increased tremendously.

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Therefore, we feel that $300 is a more realistic figure.

Once a sufficient representation has been made to the district judge or whoever the presiding judicial office or magistrate may be, that the circumstances were so exigent that there was no way that the attorney could come to the judge and get prior authority for more money, and that he had to do what he did to properly represent his client, we feel the judge should be permitted to authorize nunc pro tunc payment of any excess over the $300 limit.

Now, there will be circumstances, I am sure, where the judge will say: well, look, you're telling me that you couldn't get to me. I was available. You took this on your own. You took your own chance. Having taken that chance, you just simply are going to have to absorb that excess over the $300.

And there will be cases where the judge will be justified in denying any excess over the $300 that could be done. I don't sit on the Judicial Conference but I report to the Judicial Conference twice a year. Many of those judges are constantly badgering me to get this nunc pro tunc provision put into the bill because they say that there are so many instances where the lawyer is suffering a complete in justice under the present law.

So, first of all, we ask that the unauthorized expenditure limit be increased to $300. Second, we ask that the authorization for nunc pro tunc payment for this excess, where the judge finds it to be reasonable and where he finds that the man couldn't get the authorization in advance of incurring the expenses, be permitted.

The other portion of our request, insofar as the investigative and expert services are concerned, is that, whereas at the present time—and this has been on the books since 1964, since the statute first came into being—the amount that the judge can authorize for expert services is only $300, we feel that that is completely unrealistic. In other words, since 1964, in 21 years, the cost for these services has not just doubled or trebled, it has quadrupled.

So, we ask that, instead of $300, that that amount be raised to $1,000.

I don't think I need to dwell on that any further. I believe it speaks for itself.

Next we come to the appointment of counsel in petty offense cases where imprisonment is authorized. The specific language of the statute at present does not permit the appointment of counsel for petty offenses at all. The *Argersinger* case has seriously undercut that provision of the statute. In that case the court held that a person cannot be imprisoned unless he was represented by counsel during the trial. In light of that decision, in those circumstances where the judge felt in a petty offense case that there was a chance that the person might be imprisoned, and he has appointed counsel, the Administrative Office has paid the bill.

But actually this is a bad situation, for this reason. In order to determine whether or not there is a possibility of imprisonment, the judge has to meet with the prosecutor, which, of course, looks bad on its face immediately, to find out what the case is all about, and what are the prospects that he might imprison him. He has to make a pretrial decision that he might or might not cause the man to be imprisoned if he is convicted.

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This obviously paints the judge into a corner, where he says: all right, I don't think that this case—on the facts that you give me, Mr. Prosecutor, and what I have learned about this case and learned about this man, I don't think there's enough here to warrant my confining this man in the event he is convicted. Hence I will not appoint an attorney to represent him. Well, the end result of this is that the judge may be faced with a Catch-22 situation. At the end of the trial when he finds out how bad a man this is and what his background is and the like, it becomes very obvious that the man should be in prison. Yet, by reason of the fact that at the beginning he had decided that he would not confine the defendent if he was convicted and he did not appoint an attorney to represent him, he ends up in a situation where he should imprison the man but, by reason of the *Argersinger* case, he can't imprison the man, because he didn't have an attorney during the trial.

We feel, and the bill provides, that where the crime itself provides for confinement, under those circumstances an attorney may be appointed. Where the judge or magistrate determines that the interests of justice require the provision of counsel during trial.

Now, there may be some situations where it would appear initially that there is no way that the judge would possibly confine the person. Nevertheless, in that case, if the interest of justice requires appointment of counsel, he can exercise his discretion where there is the possibility of confinement. The bill provides that in this case there may be an attorney appointed.

This concept is endorsed by the ABA and most of the legal authorities that we have conferred with on the matter. It only seems fair. Needless to say, if he is going to be confined, as the *Argersinger* case states, he should have an attorney. Rather than force the judge into a situation where he will be unable to imprison the man, notwithstanding the fact that he deserves it, we feel that this is a better way to handle that situation.

Now, the CCCA provided for the appointment of counsel for a material witness who is subject to detention under the Bail Reform Act. But that's as far as they went. They didn't provide an attorney for him in the event his deposition had to be taken. There is no other provision in the CCCA—if it was intended we don't know—but if the Congress intended that there should be a provision, a mandatory provision for the appointment of counsel for any material witness who is in custody, it failed to do so.

At the present time, it is a discretionary appointment under the terms of the Criminal Justice Act, and that's all.

We feel that it should be mandatory. We think such a provision in the act would merely conform to the requirements of the Constitution that a person who is subject to confinement should be provided with an attorney.

It could have been an oversight on the part of Congress that they didn't go into this further, but they were more concerned with the Bail Reform Act than they were with the Criminal Justice Act at the time that they adopted the CCCA in 1984. I think, had this been given some consideration by them, they probably would have accepted the amendment we are now suggesting.

I would like now to discuss the subject of professional liability protection. In *Ferri* v. *Ackerman* and *Polk County* v. *Dodson*, the

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Supreme Court has spoken out rather clearly that a Federal defender, we think, although it's dictum in the *Ferri* case, nevertheless, there is sufficient language in those cases to suggest that there is no reason why a Federal defender is not subject to malpractice action on the part of a disgruntled defendant.

Needless to say, these decisions have upset all of the Federal defender offices. At present, neither the Federal defenders nor their assistants have malpractice protection. The private attorneys who participate in the program, that is, the panel attorneys, unless they are insane, they all have malpractice insurance. I don't know of any attorney that is practicing today who would not have malpractice insurance. In light of the number of actions that have been brought against all professional people for malpractice, anyone who is in a profession nowadays has malpractice insurance. The cost of that malpractice insurance, of course, is absorbed in their overhead.

Nevertheless, the Federal defender has no protection whatsoever. Now, it has been suggested that you might give them some kind of immunity. This takes away from a dissatisfied defendant a common law right that he presently possesses. In the event he has been improperly represented, he would be deprived of a right of action to which he is entitled, and the Judicial Conference is of the opinion this would be improper.

It has been suggested that the problem might be handled some way under the Federal Tort Claims Act. But then you have the Federal defender who is tied in solidly with the government that has prosecuted the defender's client. This idea runs counter to the concept that was emphasized when the Criminal Justice Act was enacted in 1964, namely the concept that the Federal defender should be independent from the government in order that he can be considered by his client as being no different than a private attorney. Therefore, to limit the defendent's remedy to suit under the Federal Tort Claims Act, where the claim has to be filed and, moreover, where under the Federal Tort Claims Act he would have to be represented by the Department of Justice and, therefore, a U.S. attorney, in order to properly defend the defense attorney, would have to go into the defense attorney's file, which would obviously have all the indications of impropriety, this would be an improper and improvident way to do it.

Therefore, what we are suggesting and what is contained in the bill, is that the Administrative Office would either provide private counsel for and hold the Federal defender harmless, provide malpractice insurance to the Federal defender.

There is another reason, too. It is the Federal defenders themselves who sometimes find it difficult now to get assistant defenders to come in by reason of the fact that they don't know what their chances are if they get sued. They are so conscious of the plethora of malpractice actions that are floating around in the courts nowadays that they want to be sure that they are protected in the event they are subject to a malpractice claim.

On page 12 of my written statement I make reference to the continuing education training of Federal defenders, their staffs, and private panel attorneys. This is provided for in the bill. It seeks a training budgetary item to be specifically provided for in the Crimi-

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nal Justice Act appropriation. At the present time 41 out of 94 district courts are being served by either Federal defender or community defender organizations. In addition, we have 18 branch offices over and above the 41 central offices. At present there are no funds specifically provided to finance the continued education and training of their staffs and panel attorneys, in particular, young lawyers who are coming along, who want to learn how to try a criminal case in the Federal courts.

Practicing in the Federal courts nowadays is getting more and more complicated. Every time you fellows come down with a new bill, the Speedy Trial Act, for instance, and the Bail Reform Act, the procedures become more complicated. Even your bill last year, the CCCA, with the sentencing provisions that will result in other procedural changes that will be included in the act are going to entail a substantial learning process on the part of Federal criminal attorneys.

As one of my colleagues—he's not a judge colleague of mine; he's a duck hunting partner of mine says but he says: "I never go over to the Federal court, it's a jungle over there, it's too complicated. Your rules, your regulations are so different than the State practice that on the infrequent time that we come over we have to spend so much time learning what it's all about.

To have these training programs set up for those who are interested in practicing in the Federal court in CJA cases would be of great assistance not only to the judges but also to the overall administration of justice in the courts.

So, what we are asking for is a budgetary item for defender offices for training of persons who want to accept CJA cases and practice criminal law in the Federal courts.

Also, I would remind you that in the initial concept of the Criminal Justice Act it was intended that there be representation by private attorneys under the act. In other words, they didn't want all CJA defendants to be represented only by Federal or community defenders or the like. They wanted part of the defense to be given to private attorneys, too, so that a substantial part of the bar would have some acquaintance with practicing criminal law in the Federal courts.

So, we ask that you support this training provision of the bill.

At the present time, the District Court for the District of Columbia is denied the right to have a defender organization under the Federal Criminal Justice Act. The number of financially eligible defendants represented by private counsel under the Criminal Justice Act are well above the 200 qualifying level provided for in the act to allow a district to establish a Federal defender or a community defender organization. The statistics show that annually at least 800 qualifying persons are provided Criminal Justice Act private attorneys in this district.

The District of Columbia is interested in having the option of a Federal defender organization. We therefore ask that the prohibition presently in the act which makes the Federal defender provision inapplicable to the District Court for the District of Columbia be eliminated.

Next is the defense fact witness fee provision. At the present time any case in which the U.S. Government is the prosecutor—

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and it is in every case before the Federal court—the U.S. attorney or one of his assistants must have to certify all defense fact witness fees. The Department of Justice has stated that this is improper. First of all, it unnecessarily takes the time of the assistant U.S. attorney or the U.S. attorney. In many instances it prevents the defense witness from being paid even when he is through testifying because the certifying U.S. attorney or his assistant must check out the witness attendance and dates and and mileage related to his or her appearance. This witness might have to wait over the weekend or longer until the U.S. attorney or assistant has had an opportunity to look over the file.

So, there are frequent delays in payment of defense fact witness fees. On the other hand, the prosecution fact witness are paid right off.

We have further problems that sometimes occur—and this is not being very charitable to the Department of Justice—but on occasion the U.S. attorney or assistant will purposely delay payment with the intent that they may be able to get additional cooperation from the defenders or defense fact witnesses.

A statement of the Department of Justice offers further reasons in support of the fee provision. This was a statement by Alan Parker, when he was Assistant Attorney General, Office of Legislative Affairs. I quote his statement: The defense witnesses are not treated as promptly and equitably as government witnesses are and that should be corrected. Obviously, public defenders and panel attorneys are being treated inequitably, since they must clear their work through opposing counsel's office.

Moreover, that there is no demonstrated justification for the present arrangement. As a matter of fact, there is ample reason why it should be eliminated and why the injustice should be corrected as the bill does.

Now, there are other amendments that are included in the bill, but these merely conform the CJA to certain provisions in the CCCA of 1984. In particular, these have to do with the provision of attorneys at certain insanity hearings that were provided for in that bill. There are some other technical changes in there that I won't go into.

I think that that concludes my verbal statement. I know I have taken too much of your time, but I wanted to get this properly before you.

I would like to remind you of the action last year. The provisions of this bill have been supported by the Judicial Conference, by my own committee, by the Administrative Office, by the Federal Defenders, by the National Association of Former United States Attorneys, by the National Association of Criminal Defense Lawyers, by the National Legal Aid and Defender Association, by the American Bar Association, and by numerous State and local bar associations and individuals.

So, on behalf of the Judicial Conference, I thank you very much for permitting me to appear before you.

Needless to say, having been in the legislature once myself, I ask for an aye vote.

I am also open to questions.

[Statement of Thomas MacBride follows:]

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STATEMENT OF THOMAS J. MACBRIDE
UNITED STATES DISTRICT JUDGE FOR THE
EASTERN DISTRICT OF CALIFORNIA
CHAIRMAN OF THE UNITED STATES JUDICIAL CONFERENCE
COMMITTEE TO IMPLEMENT THE CRIMINAL JUSTICE ACT

BEFORE THE SUBCOMMITTEE ON
COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JJDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

HEARINGS ON H.R. 3004
NINETY-NINTH CONGRESS

JULY 25, 1985

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Introduction

Mr. Chairman and members of the Subcommittee, I appreciate the opportunity to appear before you today to express the views of the Judicial Conference of the United States on H.R. 3004. This bill would amend the Criminal Justice Act (CJA), 18 U.S.C. §3006A, to improve the delivery of legal services in the federal criminal justice system to persons who are financially unable to obtain adequate representation.

I present these views in my capacity as Chairman of the Judicial Conference Committee to Implement the Criminal Justice Act. My Committee is charged by the Judicial Conference with policy oversight of the implementation and operation of the CJA. I have served as a member of the Committee since 1969 and as its Chairman since 1979.

Appearing with me today is Mr. Theodore J. Lidz, Chief of the Criminal Justice Act Division of the Administrative Office of the United States Courts, who under the supervision of the Director of the Administrative Office, oversees the administration of the CJA on a day-to-day basis. In performing this function Mr. Lidz and his staff are in constant touch with judges, magistrates, circuit executives, federal defenders, and others closely associated with the implementation of the Act. Mr. Lidz also serves as executive secretary and counsel to my Committee.

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H.R. 3004 was introduced at the request of the Judicial Conference, and incorporates, with minor technical revisions, the provisions of H.R. 4307, the Judicial Conference supported CJA revision bill which, during the last Congress, was passed by the House of Representatives but not acted upon by the Senate. H.R. 4307, which would have increased compensation rates and maximums under the CJA and effected several other important program improvements, was drawn from and incorporated many of the provisions of a draft CJA revision bill which had been introduced upon the request of the Judicial Conference in both the 97th (H.R. 5190) and 98th (H.R. 3233) Congresses. H.R. 3004 also incorporates the provisions of H.R. 5189 (97th Congress) which was introduced upon the request of the Judicial Conference and would have amended §1825 of title 28, United States Code, to rectify problems with the current procedures for certifying payment of fees to defense fact witnesses. The proposals embodied in H.R. 3004 represent the culmination of efforts since 1976 on the part of the Judicial Conference, its Committee to Implement the Criminal Justice Act, the Criminal Justice Act Division of the Administrative Office of the United States Courts and the Federal Defender Advisory Committee to update and improve the implementation of the CJA.

The primary focus of our legislative efforts has been the compensation rates and maximums payable to attorneys and other persons providing representational

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services under the CJA. As you know, last fall an increase in CJA compensation was enacted as "The Criminal Justice Act Revision of 1984" (P.L. 98-473, Title II, §1901, 98 Stat. 2185, October 12, 1984). This adjustment, the first in nearly fourteen years, doubled the hourly rates of attorney compensation by raising the limits to their current levels of $60 per hour for in-court time, and $40 per hour for out-of-court time, and also doubled the case compensation maximums. While the Criminal Justice Act Revision of 1984 was a welcome development, the relief it provided in the compensation area is insufficient. Moreover, the Judicial Conference has long favored a comprehensive treatment of the CJA. Our proposals to the current and the last two Congresses have included provisions which, in addition to providing a more complete and flexible treatment of the compensation issue, would address several other important problems concerning the administration and operation of the CJA. For the reasons which follow, the Judicial Conference urges favorable consideration and passage of H.R. 3004.

Attorney Compensation

In June of 1983, when I testified before this Subcommittee on H.R. 3233, I emphasized the growing problems created by the inadequacy of the rates and compensation maximums for CJA representation. I advised of the increasing accounts of experienced counsel resigning from CJA panels or refusing to take new assignments and the inordinate effort and time which judges, magistrates, and

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their staffs must expend in locating qualified counsel willing to accept appointments. In addition to creating judicial inefficiencies, this situation threatens timely access to counsel. The inadequacy of the rates also provides a temptation for attorneys to "cut corners" in their representation of CJA defendants. These factors can thus deprive those financially unable to retain counsel of rights afforded by the Constitution and enjoyed by those with greater economic means. The impact of the inadequacy, in 1983, of the rates and compensation limits which were established in 1970, was documented in a survey conducted on behalf of my Committee. The results of that survey, which appear in the report of the House Committee on the Judiciary on H.R. 4307, H.R. Rep. No. 987-764, 98th Cong., 2d Session, 22-26 (1984), revealed that 73 of the 85 districts which responded to the survey perceived serious problems with those rates.

Although the doubling of the attorney compensation rates and maximums has furnished partial relief with respect to the difficulties encountered by the courts in recent years in recruiting and retaining qualified private attorneys to serve on their CJA panels, we are convinced that these increases fall short of what is required to ensure that the CJA fulfills its congressional mandate to provide adequate representation under the Sixth Amendment to those individuals who are unable to reasonably afford defense services.

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In many districts the overhead costs of law practice continue to equal or exceed the rates authorized under the CJA for out-of-court hours. The problem is particularly acute in districts with a high cost of living or scarcity of qualified and experienced criminal defense attorneys who are willing to accept CJA appointments at the current rates.

The compensation structure of the CJA was originally premised upon the belief that the federal government is entitled to benefit from an attorney's obligation to provide *pro bono* services. However, the continued viability of this concept -- as well as its fairness -- is questionable given the fact that this economic burden has fallen upon a very small segment of the bar and the long overdue doubling of rates of compensation did not sufficiently close the gap between fair and reasonable compensation and that which is now authorized.

The compensation structure of H.R. 3004 will do more than merely change the dollar amounts of the hourly rates and case compensation maximums. It is designed to ensure the delivery of adequate representation in each judicial district and circuit, and to provide a mechanism for maintaining that level of service in the future.

H.R. 3004 would eliminate the in-court/out-of-court hourly rate differential, and establish a flat hourly rate maximum of $50. While the $50 rate represents a decrease from the $60 rate currently applicable to in-court hours, the change is expected to result in a moderate increase in

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the total amount of compensation paid in most cases, since approximately 75% of all hours expended by CJA counsel are for services performed out of court. At the same time, the elimination of the need to administer two rates should produce some cost savings to the judiciary.

In addition, the Judicial Conference would be authorized to establish a higher maximum hourly rate, not to exceed $75, for a particular circuit or district within a circuit, if it determines that circumstances warrant an exception from the general maximum. The imposition of an inflexible rate system upon the vastly different 94 judicial districts is certain to produce inequities. Conversely, the provision for varying rates among the districts and circuits will give the judiciary the opportunity to better assure that the quality of representation afforded a criminal defendant under the CJA does not vary depending upon the jurisdiction in which he or she is tried. Guidelines for determining such hourly rates would be established by the Judicial Conference. The Conference in passing upon requests for increases to the $75 level will take into account such factors as the minimum range of the prevailing rate for qualified attorneys in the individual districts, and the recommendation of the judicial councils of the circuits.

Equally important is the provision which would authorize after three years, but not require, the Judicial

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Conference to periodically increase the $50 and $75 maximums by an amount not exceeding federal pay comparability factors, if any, granted to federal employees. The Judicial Conference believes that the inclusion in the CJA of a limited mechanism for administrative adjustments of the compensation rate will further enhance its flexibility while relieving Congress of the burden of periodically reviewing the CJA to ensure that the available compensation remains sufficient to fulfill the purposes of the Act.

Finally, H.R. 3004 would raise the overall case compensation maximums and also modify the standard for waiving them. The new limits, which would be required in view of the proposed hourly rate increases, are $5,000 for felonies, $1,500 for misdemeanors, $3,000 for appeals, and $1,000 for other representation provided under the CJA. The bill would retain the current requirement that all payments in excess of the case maximums be approved by both the presiding judicial officer and the chief judge of the court of appeals. Authorizing officials will continue to apply the Guidelines for the Administration of the Criminal Justice Act, promulgated by the Judicial Conference, and claims will still be audited by the Administrative Office. Raising the maximums is justified both by the need to maintain a relationship between hourly rates and over-all compensation maximums and the interest in relieving the circuit chief judges of unnecessary administrative burdens

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associated with their review and approval of exceptions. The presiding judicial officer's authority to certify excess compensation would no longer be limited to cases which are "extended or complex." Under the new standard, the maximum could be waived by the chief judge of the court of appeals upon the presiding judicial officer's certification that excess payment is necessary to provide "fair compensation."

Investigative, Expert and Other Services

The CJA limits to $150 payments for investigative, expert and other services obtained without prior court authorization; and to $300 payments where prior authorization was granted by a district judge or magistrate. The Act currently provides that payment for services obtained with prior court authorization in excess of the $300 limit must also be approved by the chief judge of the circuit. The $150 limit has remained unchanged since it was established in 1970, and the $300 has been in effect since the passage of the CJA in 1964. Adjustments to these limits are long overdue. This bill would authorize judicial officers to approve up to $300 in payments to experts without prior court authorization, and increase to $1,000 the authority of judges and magistrates to approve payment for such services without having to obtain the approval of the chief judge of the circuit. The proposed changes represent more reasonable ceilings in view of the increases in fees charged by investigators, psychiatrists and other

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experts during the nearly twenty-one years since the $300 limit was established.

The current language of the CJA does not permit *nunc pro tunc* or retroactive authorization of investigative, expert and other services obtained by counsel in excess of $150. The inability to retroactively authorize services which were necessary and would have been approved by the court if prior authorization had been possible limits the activities of counsel in the proper discharge of their responsibilities, penalizes conscientious efforts on behalf of clients and can place unnecessary demands upon judicial officers in addressing exigent circumstances. The amendments would authorize judges and magistrates to approve payment for such services and costs reasonably incurred in exceptional situations where the procurement of necessary services could not await the required prior court authorization.

Appointment of Counsel in Petty Offense Cases Where Imprisonment is Authorized

The present language of the CJA excludes appointment of counsel in petty offense cases. However, as a result of the Supreme Court decisions in Argersinger v. Hamlin, 407 U.S. 24 (1972), and Scott v. Illinois, 440 U. S. 367 (1979), persons charged with a petty offense may not be sentenced to a term of imprisonment unless afforded the assistance of counsel. In view of these decisions, attorneys are presently being appointed in petty offense cases if there is

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a likelihood of imprisonment, and compensation is being paid under the existing provision of the CJA which extends its coverage to all cases where the Sixth Amendment to the Constitution requires the appointment of counsel.

H.R. 3004 will amend the CJA to specifically authorize the court to appoint counsel for financially eligible persons charged with a petty offense where confinement is authorized by statute and representation is determined to be in the interest of justice.

This authority will obviate the need for judicial officers to assess, during preliminary proceedings -- prior to the presentation of evidence and factors bearing on aggravating or mitigating circumstances, the nature of the offense and the character of the offender -- the likelihood that they will impose a sentence of incarceration upon conviction.

Appointment of Counsel for Material Witnesses in Custody

The appointment of counsel for financially eligible material witnesses in custody is now required, at least with respect to the detention hearing, by the Bail Reform Act of 1984. That Act, however, did not provide a conforming amendment to the CJA. Thus the CJA continues to treat material witness matters as a discretionary appointment. Although it is not clear whether the Congress intended to extend the mandatory appointment in connection with material witness detention hearings to further proceedings including

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the taking of depositions, it is the view of the Judicial Conference that any material witness who is incarcerated against his or her will should have the assistance of counsel. The amendments would so provide and also remove the present ambiguity.

Professional Liability Protection

The Judicial Conference also strongly endorses the provisions of this bill which would authorize protection for employees of federal public defender and community defender organizations who face lawsuits alleging legal malpractice and negligent acts and omissions arising out of their performance of representational services within the scope of their employment. The Supreme Court's decisions in Ferri v. Ackerman, 444 U. S. 193 (1979) and Polk County v. Dodson, 454 U.S. 312 (1981), have heightened the concern of the Judicial Conference and the federal defenders about the adverse impact on the federal defender program and its employees of the potential exposure of federal defender employees to personal liability for legal malpractice and related claims. The provision would give the Director of the Administrative Office of the United States Courts the statutory authority to either provide representation and hold harmless, or provide liability insurance for, employees of federal public defender and community defender organizations. For your reference, we have attached a copy of my statement made on behalf of the Judicial Conference in

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support of H.R. 3060, (97th Congress), a bill which would have separately addressed this issue.

Training

One of the amendments would provide specific authorization for the training and continuing education of federal defenders and their staffs and for CJA panel attorneys. Provision for federal defender training is currently handled through appropriations to the Federal Judicial Center but would more appropriately be included in the budgetary process for federal defender offices. No funds are presently authorized or available for the development and delivery of educational services to CJA panel attorneys.

The reluctance of newly admitted attorneys to serve on CJA panels and the tendency of more experienced attorneys to avoid appointments, or to resign from panels altogether, has been attributed to the following factors:

1. the increased complexity of federal law, prosecutions, rules and procedures (e.g. the Speedy Trial Act and the Bail Reform Act of 1984);
2. the higher degree of formality of federal practice and procedures in relation to those of the states (including written rather than oral motion practice and more limited discovery);
3. the greater level of specialized federal criminal

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practice experience of Assistant United States Attorneys who represent the government in criminal cases (which is, no doubt, reflective of the comprehensive training programs conducted for them by the Department of Justice);

4. the high cost of keeping abreast of changes in federal laws, rules and procedures and maintaining resource materials and proficiency in federal criminal practice;
5. the inadequacy of attorney compensation in relation to prevailing fees.

The authorization to conduct training programs at the local level will enhance the quality of representation and the administration of justice and should help to alleviate some of the resistance to service on CJA panels. Training oriented toward CJA policies and procedures can be expected to reduce the burden upon those who must now provide individual counseling with respect to voucher preparation, documentation in support of claims, procedures for obtaining authorization for transcripts and expert services and other ministerial aspects of representation. Training with regard to federal criminal laws and practice and circuit and local rules should reduce the number of frivolous motions and streamline the adjudication of cases. Moreover, such training is expected to remove the aura of mystique felt by those who are unfamiliar with federal

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practice and encourage both newly admitted and experienced attorneys to accept appointments. Finally, it will make available to every district and circuit the kind of support in the administration of the CJA which is currently provided only in those areas which are served by federal defenders.

Federal Defender Option for the U. S. District Court for the District of Columbia

H.R. 3004 would also amend the CJA to authorize, but not require, the United States District Court for the District of Columbia to establish a federal defender organization, an option not available to this district under current law.

Defense Witness Fees

Currently, 28 U.S.C. §1825 provides that, in any case in which the United States is a party (which includes all criminal cases), the United States attorney or an assistant United States attorney must certify the claims of witnesses for the payment of witness fees. This provision applies to witnesses whether they are appearing on behalf of the government, or a defendant or petitioner for whom CJA services are authorized. The Judicial Conference finds that this method of certifying defense witness fees in federal criminal cases is impractical since the U. S. Attorney's Office often is not aware of the reimbursable activities of defense witnesses. In addition to its administrative burdens, the procedure creates a potential conflict of interest for United States attorneys. The Conference,

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therefore, strongly supports the provision of H.R. 3004 which would authorize federal public defenders and other counsel appointed under the CJA to certify for payment defense fact witness fees in federal cases. This proposal has also had the support of the Department of Justice for the past two Administrations.

Other Amendments

H.R. 3004 would also effect several other amendments which are needed to conform the CJA as a result of certain changes in the statutory and decisional law since its last comprehensive revision, and will provide for similarly required modifications when the sentencing provisions of the Comprehensive Crime Control Act of 1984 become effective in November of 1986. These, as well as other technical revisions, are discussed in more detail in the section-by-section analysis which was included with the transmittal of the Judicial Conference draft bill.

Conclusion

As you know, apart from the embodiment of conforming amendments necessitated by the Comprehensive Crime Control Act of 1984, and the incorporation of language to change the defense witness certification procedures, this bill is the same as H.R. 4307 which last year had the unanimous support of your Subcommittee and was approved by the full Committee on the Judiciary and passed by the House of Representatives without objection. The bill had the enthusiastic support of

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the Judicial Conference of the United States and its Criminal Justice Act Committee, the Administrative Office of the United States Courts, the Federal Defenders, the National Association of Former United States Attorneys, the National Association Criminal Defense Lawyers, the National Legal Aid and Defender Association, the American Bar Association and numerous state and local bar associations and individuals. Notwithstanding the relief afforded by the Criminal Justice Act Revision of 1984, the measures contained in H.R. 3004 are vitally needed and the United States Judicial Conference urges swift enactment of the bill.

Mr. Chairman, on behalf of the Judicial Conference of the United States, I thank you once again for affording me the opportunity to present its views on these proposed comprehensive revisions of the CJA. I would be happy to answer any questions that you or the other members of your Subcommittee may have.

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STATEMENT

OF THE

HONORABLE THOMAS J. MacBRIDE
UNITED STATES DISTRICT JUDGE FOR THE
EASTERN DISTRICT OF CALIFORNIA
CHAIRMAN OF THE UNITED STATES JUDICIAL CONFERENCE
COMMITTEE TO IMPLEMENT THE CRIMINAL JUSTICE ACT

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

ON

H.R. 24 AND H.R. 3060

WEDNESDAY

MAY 26, 1982

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SUMMARY OF STATEMENT ON BEHALF OF THE HONORABLE THOMAS J. MacBRIDE,
UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF CALIFORNIA,
CHAIRMAN OF THE UNITED STATES JUDICIAL CONFERENCE COMMITTEE
TO IMPLEMENT THE CRIMINAL JUSTICE ACT

Since the Supreme Court's decision in Ferri v. Ackerman, 444 U.S. 193 (1979), the Judicial Conference and the Federal Defenders have been seriously concerned about the impact on the Federal Defender Program of the potential exposure of Federal Defenders, and their staffs, to personal liability for negligent acts or omissions while acting within the scope of their duties and responsibilities in providing representational services under the Criminal Justice Act.

The Judicial Conference considered, but rejected, proposing an amendment to the Criminal Justice Act to provide statutory immunity to Federal Defenders. The reasoning was that providing immunity for Defenders would not only deprive plaintiffs alleging malpractice of an existing common law remedy for negligence against the Federal Defenders, but also could impair the ability of Federal Defenders to properly function in providing representation because of the difficulty of developing, within the traditional attorney-client relationship, the complete trust and confidence of the client in the face of an increase in the Defender's ties to, and dependence upon, the government.

The Judicial Conference does not favor an amendment to the Federal Tort Claims Act to indirectly immunize Federal Defenders through establishing an action against the United States as the exclusive remedy for the negligent acts or omissions of Defenders. Such an approach would not only eliminate an existing right at common law, of bringing an action against the Federal Defender sounding in negligence, but would also result in a conflict intrusion into the organization and operation of Federal Defenders' offices by United States Attorneys, since the Department of Justice is the agency exclusively charged with representing and defending the United States against claims arising under the FTCA.

The Judicial Conference supports, endorses, and urges the passage of H.R. 3060 as the best method of providing insulation to Federal Defenders against personal liability for negligence arising out of the performance of official duties and responsibilities in providing representational services under the Criminal Justice Act. This bill would not grant Federal Defenders immunity from suit, nor would it take away any rights of the plaintiffs claiming malpractice. It would insulate the Federal Defenders from personal liability and, by giving the Director of the Administrative Office the flexibility to be a self-insurer or obtain liability insurance, it avoids the potential conflict that could be created by having the Department of Justice undertake the representation and defense of a Federal Defender's professional conduct.

The Federal Defender Program, created under the 1970 amendments to the Criminal Justice Act, has been successful primarily because Federal Defenders have been able to attract -- and retain -- highly qualified, competent attorneys with experience in the practice of criminal law. The "program" will maintain its successful record only so long as it is able to continue to attract, hire, and retain such qualified personnel. Given the limitations currently existing on the amount of compensation of federal officers and employees, to aggravate this situation by requiring attorneys employed by Federal Defenders to personally pay the cost of professional liability insurance could serve to severely hamper the ability of Federal Defenders to find the quality of attorneys that consistently have been representative of the program.

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STATEMENT ON BEHALF OF THE HONORABLE THOMAS J. MacBRIDE, U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF CALIFORNIA, CHAIRMAN OF THE UNITED STATES JUDICIAL CONFERENCE COMMITTEE TO IMPLEMENT THE CRIMINAL JUSTICE ACT TO THE SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES HOUSE OF REPRESENTATIVES

Mr. Chairman, I would like to thank you for the opportunity to present the views of the United States Judicial Conference on two of the bills concerning which your Subcommittee is holding hearings -- H.R. 24, a bill to amend the Federal Tort Claims Act to provide, in part, for an exclusive remedy against the United States in suits based upon the torts of United States employees; and H.R. 3060, a bill to amend the Criminal Justice Act to provide protection against personal liability to the officers and employees of Federal Defender Organizations providing representation under the Act.

For the reasons discussed herein, the Judicial Conference endorses and supports H.R. 3060, and urges its favorable consideration and passage.

Prior to December, 1979, the question of whether Federal Public Defenders were exposed to personal liability for malpractice was unsettled, however it was thought that they were within the scope of the doctrine of official immunity for Federal officers. It was believed that Federal Public Defenders enjoyed immunity against claims for malpractice arising out of the providing of defense services similar to the immunity enjoyed by judges and prosecutors.

However, the United States Supreme Court's decision in Ferri v. Ackerman, 444 U.S. 193 (1979), although not dealing specifically with Federal Public Defenders, has been interpreted as rejecting the existence of immunity against malpractice claims

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for any attorney appointed under the Criminal Justice Act -- whether a private attorney or an attorney provided by a Federal Public or Community Defender Organization established and operating under subsection (h) of the Act.

The specific issue raised in the Ferri case was whether a private attorney, appointed by a Federal judge to provide representation under the Criminal Justice Act in a Federal criminal trial, was as a matter of Federal law, entitled to absolute immunity in a State malpractice action. The Court noted several valid policy reasons that might justify an immunity for appointed counsel that need not be accorded privately retained counsel. However, in its unanimous decision, without reaching the question concerning the power of Congress to create immunity, the Court held that Federal law does not now provide immunity for court appointed counsel in a State malpractice suit brought by a former client.

In footnote 16 of the opinion, the Court stated, in part:

> "We have found nothing in the legislative history of the amendments [to the Criminal Justice Act] that indicates Congress intended public defenders to be immune from malpractice actions." [Emphasis added] Ferri v. Ackerman, supra, at p. 200.

At their annual meeting in January, 1980, Federal Defenders expressed their great concern over their apparent exposure to personal liability for malpractice potentially created by the Ferri decision. This concern was conveyed to the Judicial Conference Committee to Implement the Criminal Justice Act (CJA Committee) which requested that the Administrative Office of the United States Courts (Administrative Office) take appropriate

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action to provide protection against personal liability for Federal Public Defenders.

Three options were presented to the CJA Committee for its consideration. First - amend the Criminal Justice Act to specifically provide statutory immunity to Federal Defenders. Second - amend the Federal Tort Claims Act (FTCA) to provide indirect immunity for Federal Defenders by making an action against the United States under the FTCA the exclusive remedy for malpractice arising out of the providing of defense services by Federal Public Defenders, in the same manner as Federal physicians, dentists, and health care personnel are currently indirectly immunized -- e.g.: 10 U.S.C. §1089; 38 U.S.C. §4116; and 42 U.S.C. §233. Third - amend the Criminal Justice Act to insulate, not immunize, Federal Defenders against personal liability by authorizing the Director of the Administrative Office to hold harmless or provide liability insurance for Federal Defenders and their staffs while engaged in providing defense services under the Act -- an authority presently provided to certain Agency heads with regard to medical, dental, and health care personnel under circumstances where the exclusivity of the FTCA is inapplicable. [See: 10 U.S.C. §1089(f); 38 U.S.C. §4116(e); and 42 U.S.C. §233(f).]

During the CJA Committee's consideration of the first option mentioned above, several issues emerged that caused concern to the Committee and to Federal Defenders. Two of these issues are:

1. Many defendants have an initial reluctance to accept representation by a Federal Public Defender because of the fact that the Defender is an officer, and employee, of the very Government that employs the prosecutor and has instituted the

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criminal prosecution giving rise to the appointment of the Defender. To single out Federal Public Defenders as one type of court-appointed counsel, and provide statutory immunity to them under the Criminal Justice Act -- a protection not enjoyed by any other type of court-appointed counsel -- would be to extend the governmental connection and umbrella under which Federal Public Defenders operate, and could serve to impair their ability to properly function in providing representation because of the difficulty of developing the complete trust and confidence of the client.

2. Under existing law, an individual who believes that a Federal Public Defender has been negligent in providing representation, has an option either of proceeding against the Defender personally, alleging a common law tort for malpractice, or electing to file a claim against the United States under the FTCA. The providing of statutory immunity to Federal Public Defenders would result in depriving an individual of an existing common law remedy, leaving only the FTCA as the exclusive remedy for claims for Defender malpractice.

Based primarily on these considerations, we do not favor amending the Criminal Justice Act to provide statutory immunity to Federal Public Defenders.

In discussing the second option mentioned above, the CJA Committee noted that, if the FTCA were established as the exclusive remedy for Federal Defender malpractice, in addition to depriving an individual of an existing common law remedy, other problems would arise. For example, assuming that a

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suit against the United States is instituted, the Federal agency charged by law with defending suits against the United States is the Department of Justice, which also has the responsibility for undertaking criminal prosecutions in the Federal Courts. An inherent conflict of interest appears clear.

The adversarial relationship between the prosecution and defense functions was recognized and addressed by the Comptroller General of the United States in 1973.

At that time, the Director of the Administrative Office requested an opinion from the Comptroller General as to whether funds appropriated for the Criminal Justice Act could be used to provide representation to Federal Public Defenders who are sued for activities undertaken within the scope of their duties.

The Comptroller General stated:

> "The Department of Justice has declined to represent these [Federal Public] defenders because of the inherent conflict of interest involved. Hence, in the absence of the availability of appropriated funds for their defense, such defense would have to be undertaken, out of the public defender-defendant's own private resources. We understand that it is your intention that the defense of the public defenders will be handled for the most part by other public defenders. [emphasis added]
>
> Appropriations for the public defender service, under 18 U.S.C. §3006A(h), are available to pay the necessary costs of litigation undertaken by the public defender service. We believe that such appropriations are also available to pay litigation costs (including minimal attorney's fees where other public defenders are not available for such purpose) incurred in defending actions undertaken within the scope of the official duties of public defenders where such defense is considered as necessary for carrying out the purposes of the appropriation and in the best interest of the United States." [53 Comp. Gen. 301, at 306-7 (1973)]

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Rather than rely solely upon an opinion of the Comptroller General for the authorization to provide representation to Federal Public Defenders, the Judicial Conference prefers to have specific authorization for this set forth in the Criminal Justice Act. H.R. 3060 would provide for this authority.

The Judicial Conference does not favor the elimination of an existing common law remedy, nor does it favor the intrusion into the organization and operation of Federal Public Defenders' offices by the United States Attorneys that would necessarily result if an action against the United States under the FTCA were the exclusive remedy for negligent acts or omissions by Federal Public Defenders in providing representation under the Criminal Justice Act.

The Judicial Conference's primary concern is to provide protection to Federal Defenders against personal liability without diminishing any existing rights or remedies, and without impairing the independence of Federal Defenders in the providing of defense services under the Criminal Justice Act.

It is therefore the opinion of the Judicial Conference that the only appropriate vehicle through which to accomplish this goal is an amendment to the Criminal Justice Act that would authorize the Director of the Administrative Office to provide representation for and hold harmless, or provide liability insurance for, any officer or employee of a Federal Defender Organization who faces a malpractice or negligence action arising out of the furnishing of representational services while acting within the scope of such person's office or employment.

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Such an approach would combine the authority to provide representation to Federal Defenders expressed in the Comptroller General's 1973 decision, with an authority parallel to that currently existing in Titles 10, 38, and 42 of the United States Code with regard to Federal medical and dental personnel. It would also, by authorizing self-insurance or liability insurance to insulate Federal Defenders, place them in a position more like that of their counterparts in private practice, for whom insulation is provided through professional liability insurance maintained by their law firms as an overhead expense.

On April 28, 1980, Senator Dennis DeConcini introduced a bill in the United States Senate, 96th Congress, S. 2617, which was essentially identical to H.R. 3060, the bill currently before this Subcommittee. At the time of introduction of S. 2617, Senator DeConcini made the following remarks:

> "The bill would not grant the defender an immunity from suit, nor would it take away any rights of the plaintiff claiming malpractice. It would insulate the public defender from personal liability and by giving the Director of the Administrative Office the flexibility to be a self-insurer or obtain liability insurance it avoids the potential conflict that could be created by having the Department of Justice represent a defender.
>
> The National Legal Aid and Defender Association has endorsed the bill and they join me in feeling that passage of this legislation is essential to maintain a strong Federal public and community defender program." [Cong. Rec. 4/28/80, at S4262-63.]

In response to a request for the views of the United States Judicial Conference on S. 2617, the Director of the Administrative Office advised the Chairman of the Senate Committee on the Judiciary that:

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> "The Judicial Conference of the United States, through its Executive Committee, supports and endorses the amendment to the Criminal Justice Act proposed by S. 2617, which would provide protection against personal liability to the officers and employees of Federal Public Defender Organizations and those Community Defender Organizations operating under periodic sustaining grants approved by the Judicial Conference of the United States."

Because of the press of other legislative matters, the 96th Congress did not take any action on S. 2617, and the bill expired with the final adjournment of that Congress.

The Federal Defenders, the Administrative Office, and the Judicial Conference continued to be very concerned about the potential exposure of Federal Defenders to personal liability for malpractice. At its March, 1981, meeting, the Judicial Conference approved a recommendation of the CJA Committee that the legislative program for the Federal Judiciary include an amendment to the Criminal Justice Act to provide protection for Federal Defenders against personal liability for malpractice.

Thereafter, the Director of the Administrative Office, on behalf of the Judicial Conference, transmitted to the President of the Senate, the Speaker of the House of Representatives, and the Chairmen of the Senate and House Judiciary Committees, a draft bill to amend the Criminal Justice Act which is identical to H.R. 3060, the bill presently before this Subcommittee.

In the letters of transmittal, the Director made the following comments:

> "The Federal Defender Program, created under 1970 amendments to the Criminal Justice Act, has been successful primarily because Federal Defenders have been able to attract -- and retain -- highly qualified attorneys with experience in the practice of criminal law;

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> and the 'program' will maintain its successful record only so long as it is served by competent, qualified personnel. Since the Supreme Court's decision in Ferri v. Ackerman [citation omitted], Federal Defenders and their assistants and employees have become increasingly concerned about the extent to which they are exposed to personal liability for acts or omissions arising from their performance of official duties and responsibilities under the Criminal Justice Act.
>
> * * *
>
> The Judicial Conference Committee to Implement the Criminal Justice Act shares the growing concerns of Federal Defenders in the wake of the Ferri v. Ackerman decision, and in response to these concerns, the Judicial Conference is recommending the enclosed draft bill as a 'remedy' for the potential personal liability of Federal Defenders arising from the absence of statutory immunity. At present, there is no statutory authority permitting the Director of the Administrative Office to expend appropriated funds for the purchase of professional liability insurance for Federal Defenders and their staffs, or for the payment of fees and expenses incurred in malpractice litigation. The enclosed draft bill would provide the authority.
>
> Rather than proposing statutory immunity for Federal Defenders, the Judicial Conference is recommending this method of 'insulating' Federal Defenders from personal liability for acts or omissions arising from the scope of their performance of official duties and responsibilities. This approach would preserve all existing remedies for those claiming malpractice, while also preserving the Federal Defender Program's abilitly to attract and retain highly qualified personnel."

The present ceiling on the compensation that can be paid to Federal officers and employees creates difficulties for Federal Public Defenders in attracting experienced, qualified attorneys to enter Federal service. If insulation against personal liability is not provided for Federal Defenders and their staffs, the situation could be aggravated by having to advise potential Assistant Federal Defenders that, in order to protect

themselves against personal liability, they will have to purchase professional liability insurance out of their own pockets. Many Federal Public Defenders believe that, in the absence of the insulation afforded by H.R. 3060, it will become increasingly difficult, if not impossible, to attract, hire, and retain, the high quality of attorneys that, to date, have been representative of the Federal Defender Program.

With regard to H.R. 24, which would establish the Federal Tort Claims Act as the exclusive remedy for torts committed by Federal officers and employees, the Judicial Conference does not wish to oppose this legislation.

As previously stated, the primary interest of the Judicial Conference is to provide insulation against personal liability to Federal Defenders and their staffs for negligent acts or omissions while working within the scope of their duties in providing representational services under the Criminal Justice Act. The Judicial Conference believes that H.R. 3060 is the most appropriate vehicle for accomplishing this purpose. If H.R. 3060 is enacted into law, the Judicial Conference does not favor the inclusion of Federal Public Defenders within the scope of H.R. 24 because of the intrusion into the organization and operation of Federal Public Defenders' offices by the United States Attorneys that would necessarily result if an action against the United States, under the FTCA, were the exclusive remedy for negligent acts or omissions by Federal Public Defenders in providing representation under the Criminal Justice Act.

On the other hand, if insulation against personal liability is not provided to Federal Defenders and their staffs through the enactment of H.R. 3060, then the exclusivity provision of H.R. 24 would be necessary to provide such insulation, and therefore should include Federal Public Defenders and their staffs in the absence of any other statutory insulation.

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Mr. KASTENMEIER. Have you concluded, Judge MacBride?

I would like to yield to my colleague from North Carolina.

Mr. COBLE. Thank you, Mr. Chairman. Mr. Chairman, Mr. Moorhead had to attend another meeting. He asked if I would submit to you his statement and ask that it be entered into the record.

Mr. KASTENMEIER. Without objection, it is so done.

[The information follows:]

STATEMENT OF HON. CARLOS J. MOORHEAD ON THE CRIMINAL JUSTICE ACT REVISION OF 1985

Mr. Chairman; I would like to commend you for the early hearing on this important legislation and I hope we can move it through our process quickly. This legislation was drafted by this Subcommittee last year and had the unanimous support of the Judiciary Committee and the House of Representatives as well. It has been 15 years since the rates set by the Criminal Justice Act have been adjusted. Last year through a stopgap measure, the Criminal Justice Act Revision of 1984, the limits were raised to their current levels of $60 per hour for in-court and $40 per hour for out-of-court time. But a compensation structure of the bill before us this morning—H.R. 3004, will do more than change the dollar amounts of the hourly rates. The comprehensive measure before us will go a long way to insure the delivery of adequate representation in each judicial district in this country.

I don't believe that anyone expects taxpayers to pay criminal defense lawyers at the same rates that our big corporations pay for their own attorneys and what this legislation provides is substantially less than that. But it does not make sense to fight crime by providing money for our police, and for our jails, if the court processes are bogged down or if convictions of criminals are ultimately revised for lack effective assistance of an attorney. Thank you.

Mr. COBLE. Judge, thank you for your comments.

Concerning appointments, Judge, last year's version addressed the matter of appointments in a discretionary manner. This current version before us provides for mandatory appointments. Can you elaborate a little on that? It also applies to the entire chapter, who requested it, and what is the reason for this expansion?

Mr. MACBRIDE. Well, it is not a large expansion, Mr. Congressman. It's in the petty offense cases. Under the *Argersinger* case, the court said that a judge cannot imprison a defendant unless he or she has an attorney during the trial. And as I stated, this places the judge in the situation where he must evaluate a petty offense case before he tries it to determine whether or not there is a possibility that he might imprison that man. If he feels there is a possibility he might imprison him, then under the *Argersinger* case, he is required to appoint an attorney. If he doesn't think there is such a possibility he presently has the discretion not to appoint the attorney. But if he tries the case and finds that the defendant should be imprisoned of he can't imprison the defendant because the defendant did not have an attorney while the case was being tried.

So, our position is that, in order to save the judge the travail of having to make that tough decision before the trial starts which, as I stated, includes conferring with the U.S. attorney on what he has got, and so forth, and revealing part of the case to him. Now it should be made clear that, wherever there is the possibility of imprisonment, that under those circumstances the attorney may be appointed, and put it right into the act.

If the statute provides for any imprisonment, if the statute provides for confinement, under those circumstances the court should have the discretion to appoint an attorney.

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Mr. COBLE. Judge, I believe you said there are 41 public defenders? Did I hear you correctly?

Mr. MACBRIDE. There are 41 defender organizations. There are 35 Federal public defender organizations and there are 6 community defender organizations, making a total of 41.

Mr. COBLE. And panel attorneys in addition to that?

Mr. MACBRIDE. Oh, yes. Every district, even those with defender organizations has to have a panel of private attorneys. That is required under the statute. And we agree with that. We feel that all the Federal defense work for defendants who cannot afford to retain counsel should not be confined just to government supported defender organizations. Actually, we want the private bar to participate and to obtain the experience of practicing criminal law in the Federal court.

Mr. COBLE. Judge, you alluded to the malpractice insurance. How much is this going to cost?

Mr. MACBRIDE. The cost, the tab on it would range from $100,000 to $150,000. That is for all of the Federal defenders that we have.

Mr. COBLE. To your knowledge, Judge, has there ever been a successful malpractice suit against a Federal or community public defender?

Mr. MACBRIDE. Not to my knowledge. We haven't had any yet.

Mr. COBLE. Finally, Mr. Chairman, one question, and I should know this, but I don't.

What are the salaries of the Federal and community public defenders?

Mr. MACBRIDE. I will defer to my colleague, Mr. Lidz, for that answer.

Mr. LIDZ. The Criminal Justice Act now provides, and this amendment would continue the concept that Federal public defenders could not be paid more than the U.S. attorneys. Most circuits have adopted policies whereby the Federal defenders in fact are paid less.

The act also provides that their assistants may be paid at rates up to those which are paid to assistant U.S. attorneys. Staff members would be treated accordingly. That is, they would be compensated at rates up to those paid in U.S. attorneys' offices. But in fact our average salary is considerably less than U.S. attorney average salaries across the board, for the attorneys at least.

Mr. COBLE. No further questions, thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from California, Mr. Berman.

Mr. BERMAN. Thank you, Mr. Chairman.

Just on that last point, why should there be a policy of paying the Federal defenders less than the U.S. attorneys? And is this differential that exists one that is based simply on the tenure of the people in the U.S. attorney's office on the average versus the tenure of people in the Federal defender's office, on the average? Or is it a result of this differential policy?

Mr. MACBRIDE. The feeling is that the U.S. attorney has a greater responsibility than the Federal defender. And it is for the reason that the U.S. attorney has not only the criminal cases to handle, which are the cases that he prosecutes against the Federal defender, that is, against the clients of the Federal defender; but in addition he has all of the civil cases. He has got the grand jury to

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handle. He has the condemnation actions. He has all the lawsuits that are filed against the United States, all the tort claims, everything. So, his office has to handle that.

It is just simply felt, at least this is the attitude, that the work of the U.S. attorney is more difficult, more comprehensive, and much greater than that of the Federal defender.

Mr. BERMAN. I see. Maybe I misunderstood. Is this differential policy one that only applies to the U.S. attorney in a particular Federal district versus the Federal defender in a particular district? Or does it apply to the assistant U.S. attorneys and the assistant, if that's the right term, Federal defender?

Mr. MACBRIDE. Actually, it's the court of appeals of the circuit that makes this decision.

May I just inquire of my colleague, it is possible for them to pay them the same amount, isn't it?

Mr. LIDZ. It would be possible to pay the same under the statute. The circuit councils have made the determination—or the courts of appeals, actually, have made the determination to pay by a formula. Generally that is less. There are some courts of appeals which do provide for comparability in fact, but that results from a tying in of defenders' salary with the highest paid assistant U.S. attorney in the district rather than parity with the U.S. attorneys.

Mr. BERMAN. I can accept the answer and the distinction between the U.S. attorney with his or her wide-ranging scope of civil and criminal duties and the Federal defender. But my assumption has been, if it's anything like the situation at the State level, say, for example, in California, that your deputies are, by and large, civil or criminal. And I don't understand why the differential would carry down to them.

Mr. LIDZ. It does not. It only applies to the Federal public defender. The public defenders set the salaries of their assistants, and they may use the same formula that the U.S. attorneys use in fixing the compensation of their assistants.

What I referred to was that in fact because the defenders have line item budgets and are very conscious of their cost, and because they have greater turnover, their offices tend to be less institutionalized. Their actual costs and average costs, average compensation for their assistants tends to be considerably less than that of the Department of Justice. But that is not to say they don't have the opportunity of paying more under appropriate circumstances.

Mr. BERMAN. By and large, would an assistant U.S. attorney who is assigned to the criminal division—if it's broken down like that, if that is the proper term—who has been there a certain number of years with a similar educational background and similar ratings make the same as a Federal public defender with a similar education, or as an assistant Federal public defender who has been there the same period of time? That is what I am trying to understand.

Mr. LIDZ. The defender has the opportunity to pay on a comparable basis under the current arrangement, yes.

Mr. BERMAN. The Conference doesn't stop him from doing it?

Mr. LIDZ. No.

Mr. BERMAN. The Federal law doesn't stop him from doing it?

Mr. LIDZ. No.

Mr. BERMAN. He decides how he wants to allocate his resources?

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Mr. LIDZ. He decides that, yes, based on the guidelines. The guidelines that we give to the defenders parallel those that are used by the Department of Justice, and the defenders can't exceed those. In other words, if the Department of Justice has a limitation on how much of an increase can be given to an assistant U.S. attorney, the Federal public defender couldn't exceed that for an assistant in his office. But they may go up to that amount.

Mr. BERMAN. Thank you, Mr. Chairman.

Mr. MACBRIDE. Mr. Chairman, there is just one thing I would like to add, just one sentence. That is in connection with the training. That is that the Department of Justice has a full training program for all of its people that work there, all of its deputies. This is something that I just want to stress in connection with the training program that we seek under the provisions of the bill.

Mr. KASTENMEIER. I have just two brief questions. I hope they can be responded to briefly.

Judge MacBride, has any event—such as the Comprehensive Crime Control Act of last year or any other amendments which may have intervened since we last took the matter up over a year ago—either indicated a greater need or a greater increase or decrease in the need for legislation such as that before us today? In other words, is it any easier or harder to recruit private counsel under the Criminal Justice Act?

Mr. MACBRIDE. I think it would be wrong for me to state that the increase in rates has not helped somewhat. But it does not solve the problem, that's all there is to it. As I pointed out, the rates are still too low. It leaves no flexibility. I read off the laundry list there of all the things that were not covered by the bill that still need to be done. So, insofar as the recruitment of attorneys to represent financially eligible defendants, there is some relief but it is not complete, particularly in those districts that I speak of, those 15 districts where there is no question about it, the new rates won't do it.

We need the higher rates. We need the flexibility. We need the flexibility particularly with relation to the Judicial Conference to be able to vary these rates and to increase these rates without having to come back to Congress all the time.

Now, as far as the CCCA is concerned, of course, it has imposed a need for this bill that we are considering today in that there have to be adjustments made to accommodate to the bill itself. The sentencing, obviously, that has to be taken care of.

Frankly, the bill has made the practice of criminal law a little more complex than it was before, rather than simplifying it. You eliminated the rule 35. This makes the job of the attorney at the beginning a little more difficult than it was previously. And there are other matters that just simply have made it a little bit tougher.

I would say that nothing has intervened, nothing has intervened to change the picture except that there is some relief, there's no question about it, that has resulted from increasing these rates.

Mr. KASTENMEIER. With respect to judges and assisting judges by relieving them of administrative burdens which are unnecessary, what in the proposal before us will aid in that direction? I think you mentioned a couple of things. You did say that standardizing the fee of $50 rather than distinguishing between in-court time and out-of-court time would aid. You have also indicated, I think, at

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least inferentially, that by providing for petty case representation, this would obviate the necessity of pre-reviewing judicially cases to determine whether representation is required.

What else in the bill——

Mr. MACBRIDE. Well, there is the other matter, of eliminating the extended and complex requirement that is presently in the statute and substituting for it fair compensation. That assists insofar as the judge is concerned that he can look at it and say: as a former attorney and experienced as a judge, I can determine that this is fair compensation, rather than his having to agonize and try to figure out how he can give this fellow fair compensation by in some way trying to define it into being either an extended or complex case.

Now, those are some.

Oh, yes, as I stated last year, the judge himself has a tough time lining up these attorneys where the rates are insufficient. Up in Alaska—I will give you an example—Jim Fitzgerald, who is the chief judge up there, stated that sometimes he is on the phone for a day at a time, a whole day, trying to get an attorney to come in. And there are only so many good criminal attorneys in Alaska, in Anchorage. And he is calling them and literally begging them to come in. The rates just aren't sufficient up there. He says he spends so much of his time on this that it is unfair to the rest of the attorneys who have cases before him that he can't get to the cases.

So, it is the time that the judges have to spend in bending arms and twisting arms to get attorneys to come in under these inadequate rates.

Mr. KASTENMEIER. Thank you. Thank you very much, Judge MacBride, for your testimony today. It has been, obviously, very helpful.

We would also, of course, like to thank Mr. Lidz for his professional assistance on some matters.

We appreciate your contribution.

Mr. MACBRIDE. Thank you very much, Mr. Chairman and members.

Again, we ask for an aye vote.

Mr. KASTENMEIER. Next we will have a panel of two attorneys. Mr. Roland E. Dahlin is the Federal public defender for the Southern District of Texas, representing Federal Public and Community Defenders, serving his third 4-year term as public defender in Houston, having been first appointed in 1974. Second we have Mrs. Bonnie Brigance Leadbetter, an attorney who has been in private practice since 1981 with the firm of Leadbetter and Becker in Philadelphia, PA. She is today representing the National Legal Aid and Defender Association. She previously served 5 years, 1971 to 1976, as assistant district attorney in Philadelphia and 5 years as an assistant U.S. attorney in the Department of Justice.

We welcome you both. You may proceed as you wish.

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STATEMENTS OF ROLAND E. DAHLIN, REPRESENTING FEDERAL PUBLIC AND COMMUNITY DEFENDERS, AND BONNIE BRIGANCE LEADBETTER, ESQ., REPRESENTING THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

Mr. DAHLIN. Thank you.

May I respectfully ask that the statement that has been submitted be made a part of the record?

Mr. KASTENMEIER. Without objection, both of your statements, which we have before us, will be accepted and made part of the record. You may proceed as you wish.

Mr. DAHLIN. Mr. Chairman, I thank you for this opportunity to appear before the subcommittee to express the views of Federal Defenders on the proposed amendments to the Criminal Justice Act embodied in H.R. 3004.

I am appearing today as chairman of the Federal Defender Advisory Committee and a former member of the Federal Defender Legislative Subcommittee.

Judge MacBridge has indicated the number of defender offices currently, and I might point out that in fiscal year 1984 a little over 52,000 persons were represented by counsel appointed under the Criminal Justice Act. Of that number, better than 52 percent, or 27,350 were represented by Federal Public and Community Defenders. I cite these figures to give some indication of the role of Federal Public and Community Defenders in the criminal justice system and our familiarity with its day-to-day operation.

We hope to provide with these comments to the committee the practical perspective of working defense lawyers and to complement the testimony of the Honorable Thomas MacBride.

Our primary objective as criminal defense lawyers is to provide the highest quality defense services available consistent with our obligations under the sixth amendment to the Constitution. This theme is basic to all of our comments and recommendations regarding the amendments.

We think that the increase in scope of representation is a modest increase. We favor the making of representation for material witnesses in custody mandatory rather than discretionary, as it is currently. This is already the practice in many districts who appoint counsel for material witnesses in custody. We think that it is essential that a person held in custody against his will by the government be represented by counsel.

In our observation, these situations currently arise most often in alien smuggling cases, and in such situations it is not unusual for the material witness to remain in custody while the individual, the smuggler, accused of a criminal offense is at liberty on bond. We have also had experience with individuals being granted, the accused in the case being given probation and deported, while the material witness who has not had representation is still in custody.

We would also recommend that the court be permitted to appoint counsel in serious petty offenses even if it is not clear that the sentence of confinement will be imposed. We think that the actual increase in persons represented under this change would be very small, but in those cases in which it would permit counsel to be

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appointed, the appointment would be very significant. I would point out that this is particularly true in examples of drug or sex offenses which may later have serious collateral consequences in terms of licensing. This could come about, for example, in a national park where State laws under the Assimilative Crimes Act are incorporated and an individual is in a Federal court even though it is a minor state offense; a conviction could have collateral consequences later as far as being licensed, for example, to teach or to become a member of the bar.

We think under those circumstances that it is appropriate that counsel be appointed.

For many years, Federal Public and Community Defenders have observed firsthand the very serious problem of inadequate compensation rates for private attorneys appointed under the Criminal Justice Act. We welcome the relief provided by the CJA revision of 1984, last October, but we favor strongly the more flexible and comprehensive treatment of the compensation rates and maxima proposed in H.R. 3004.

My colleague, Ms. Leadbetter, will speak to this in greater detail.

We also strongly favor the proposed increases in the amount authorized for payment for investigative, expert and other services. My experience is that the current limits are simply not realistic for private panel counsel in particular. The increases simply bring the limits in line with reality.

Also, we would urge strongly that, because of the exigencies of practice, it is most necessary as the amendments would permit, to allow a judge or a magistrate to approve a claim for these services, investigative services for example, obtained by appointed counsel, even though prior authorization has not been secured and the amount of a claim exceeds the limit payable without the prior authorization.

While the apparent actuarial risk is very low and there have been no judgments, to my knowledge, against Federal Public Community Defenders, we feel strongly that the attorneys in our offices should have the same professional liability protection as private practitioners and members of the CJA panel who are in private practice. As has been indicated, if there were any doubt as to the exposure to coverage of Federal defenders, that doubt has been eliminated by the Supreme Court cases, *Ferri* v. *Ackerman* and *Polk County* v. *Dodson*.

We don't think this is inappropriate. We recognize that Federal defenders have a unique role in the criminal defense system. Our role is unique because we are funded by the government. But contrary to most other government employees, our primary obligation is not to the government but indeed to the individual clients in a professional attorney-client relationship. We work side by side, often in the same case, with appointed counsel, that is private appointed counsel, who are protected by malpractice insurance.

The current statutory law does not specifically address the unique problems of malpractice liability of Federal defenders. There is no provision for legal representation and no provision for money judgment.

One solution, to bring Federal defenders under the Federal Tort Claims Act, we consider unacceptable. That arrangement, we

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think, would provide for defense of Federal offenders in malpractice suits by the Department of Justice, would create a serious conflict by so doing, and would potentially compromise the confidentiality of a defense file which would need to be reviewed by Department of Justice attorneys.

We think that it is not appropriate to discriminate against a small segment of the defense bar of the legal profession. I can say personally that this question of how to provide for malpractice insurance, this area does hamper the recruitment of vigorous attorneys necessary to the effective operation of the criminal justice system.

For those reasons we favor the hold harmless arrangements that could be made under these amendments or the provision for malpractice insurance that could be handled by the administrative office for Federal defender attorneys.

Since Federal Public and Community Defenders operate under the judicial branch of the Government, under the current law, our training funds come through the appropriations of and are administered by the Federal Judicial Center. The center, of course, must provide training for all members and employees of the Federal judiciary, and unanticipated needs for other elements of the judiciary can result in a sharp decrease, and sometimes unexpectedly, of funds for training for Federal defenders.

There are, I think, two aspects of the training we as defenders would like to be able to have included in our appropriations so that we could have some direct control over the training for ourselves and our assistants, the people of our office. We also would like the authority that the bill would give to be able to be leaders in our community and to include private panel counsel in the training which we conduct and which the Federal Judicial Center conducts.

For these reasons we favor the adoption of this aspect of the amendments.

We are speaking in favor of the adoption of the amendments before you in H.R. 3004.

Mr. Chairman, on behalf of all Federal Public and Community Defenders in the United States, we thank you once again for the opportunity to present our views on these proposed amendments and to answer questions of members of the subcommittee and staff. Please feel free to call on us at any time if we may be of assistance in connection with this or any other Federal criminal justice legislation.

[Statement of Roland Dahlin follows:]

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Dahlin

STATEMENT
of the
FEDERAL PUBLIC AND COMMUNITY DEFENDERS
on
H.R. 3004
AMENDMENTS TO THE CRIMINAL JUSTICE ACT

Prepared for the
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
and the ADMINISTRATION OF JUSTICE

COMMITTEE ON THE JUDICIARY
United States House of Representatives

July 25, 1985

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INTRODUCTION

Mr. Chairman, we thank you for the opportunity to appear before the Subcommitee and express our views on the proposed amendments.

The Federal Public and Community Defender Program was authorized under legislation passed in 1970. There are now forty-one defender offices in the country's ninety-four judicial districts. In fiscal 1984, approximately 52,300 persons were represented by counsel appointed under the Criminal Justice Act. Of that number, 27,350 (52.3%) were represented by Federal Public and Community Defenders. These figures offer some indication of our role in the federal criminal justice system and our familiarity with its day-to-day operation. In our appearance at these hearings, we hope to provide the Committee with the practical perspective of working defense lawyers to complement the testimony of the Honorable Thomas J. MacBride, Chairman of the Judicial Conference Committee to Implement the Criminal Justice Act.

The Legislative Subcommittee of the Federal Defender Advisory Committee has been active in working with the proposed amendments to the Criminal Justice Act for a number of years. The Defenders contributed heavily to the drafting of the proposed amendments, and the Judicial Conference

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Committee notes to earlier versions of the bill reflect the views of the Federal Public and Community Defenders as a group.

Our primary objective as criminal defense lawyers is to provide the highest quality defense services available consistent with our obligations under the Sixth Amendment to the Constitution of the United States. This basic theme is central to all of our comments and recommendations regarding the proposed amendments, only a few of which will be touched on in this brief written statement. During the hearings, we hope to be able to expand on this written presentation in response to questions from the Committee.

This statement is the product of the Legislative Subcommittee of the Federal Defender Advisory Committee. Those present or former Federal Defenders who worked on the Subcommittee which produced this statement are: Robert Altman, formerly Community Defender for the Northern District of Georgia; Phylis Skloot Bamberger, Southern District of New York and Second Circuit; Roland E. Dahlin II, Federal Public Defender for the Southern District of Texas; James R. Dunn, formerly Federal Public Defender for the Central District of California; William Farmer, formerly Federal Public Defender for the Middle District of Tennessee; Jack Lipson, Southern District of New York; and, Edward F. Marek, Northern District of Ohio.

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SCOPE OF REPRESENTATION

There is a modest increase in the scope of representation available under the proposed amendments which we believe will conform the Act more closely to practical realities of the practice and the defense needs of persons at critical stages of the proceedings.

H. R. 3004, subparagraph (a)(1)(G) makes representation of material witnesses in custody mandatory rather than discretionary, as under current subsection (g). This is already the practice in most districts where there are substantial numbers of material witnesses and, in our view, it is essential that a person held in custody against his will by the government be represented by counsel. These situations currently arise most often in alien smuggling cases. In the absence of such representation, the alleged alien smuggler will often be out on bail for a matter of months pending trial while the material witnesses, who have been charged with no crime, remain in custody in a jail-type facility.

We also recommend that the court be permitted to appoint counsel in serious petty offenses even if it is not clear that a sentence of confinement will be imposed. This change is found in subparagraph (a)(2)(A) of H. R. 3004. The actual increase in persons represented under this change would be

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very small; however, in those cases in which it would permit appointment of counsel, that appointment would be very significant. This is particularly true in drug and sex offenses which may later have serious collateral consequences in terms of licensing, etc.

HOURLY RATES AND STATUTORY MAXIMA FOR APPOINTED COUNSEL

Previously, the United States Judicial Conference has very forcefully and clearly stated the problem of inadequate rates of compensation for CJA attorneys and the impact that these rates had around the country. The serious problem of inadequate compensation rates for CJA attorneys was addressed in part by the increase in rates enacted by "The Criminal Justice Act Revision of 1984" (P. L. 98-473, 98 Stat. 1837, October 12, 1984).

Before that increase of compensation, Federal Public and Community Defender offices, in the day-to-day operations of the courts, saw the impact of these substandard rates up close. Not a week went by that the majority of Defenders in the country did not hear complaints about the rates of compensation from members of their CJA Panel with whom they interact on a close personal basis. We also felt the impact

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of these rates as counsel left or refused to serve on the panels, and the quality, competence, and experience level of those willing to serve declined. In some instances, even those attorneys who are very experienced simply were not able to devote the time necessary, in view of conflicting obligations in their active private practices. As a consequence of those conditions, for example, a critical bail motion may not be made, or the lack of preparation or experience of counsel will seriously compromise a carefully crafted defense in a co-defendant case, thus reducing the quality of defense representation for all persons involved in that case.

One must remember that federal judges impose the same rigorous calendaring, preparation and performance demands on appointed panel counsel as they do on Federal Public and Community Defenders and private attorneys. Trial calendars of private practitioners can be seriously disrupted by short trial settings, and the other heavy demands in a federal criminal case to such a point that the attorney simply could not justify the impact on his or her private practice caused by a few federal criminal cases for which he was receiving compensation far below his operating overhead. Moreover, a lengthy trial can virtually destroy the practice of an attorney who is in solo practice or in a small firm.

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Federal Defenders observed the serious problems caused by previous compensation schemes and the fact that no change in rates occurred for fourteen years, including seven years after a Judicial Conference recommendation for an increase in rates. Recognizing that the CJA Revisions of 1984 addressed the issue in part, we favor the more flexible and comprehensive treatment of compensation rates and maxima proposed in H. R. 3004. The proposed structure, which would allow the Judicial Conference to vary attorney compensation rates geographically (within limits) and provide for inflation, appears to us to be a good resolution of the problem. The proposed new rate setting structure will also allow the kind of diversity which we believe will be necessary since, in fact, the problem regarding attorney fee rates is not the same in all parts of the country. This new system will provide the mechanism to make a continuing comprehensive analysis and set rates which would provide fair and reasonable compensation to attorneys based on the cost of living and comparable private fees in each particular district.

INVESTIGATIVE, EXPERT AND OTHER SERVICES

We strongly favor the proposed increases in the amount authorized for payment for investigative, expert, and other services. The current limits are not realistic; the increases simply bring the limits in line with reality.

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Also, the exigencies of practice strongly favor adopting the provision, at subparagrapn (e)(2)(B) of H. R. 3004 allowing a judge or magistrate to approve a claim for these services obtained by appointed counsel even though prior authorization has not been secured and the amount of the claim exceeds the limit payable without prior authorization.

MALPRACTICE PROTECTION

While the apparent actuarial risk is very low, and there have been no judgments against Federal Public and Community Defenders, we feel strongly that the attorneys in our offices should have the same professional liability protection as private practitioners and members of the CJA Panel who are also in private practice. Had there been any doubt regarding the status of Federal Public and Community Defenders, that was dispelled by the United States Supreme Court in Ferri v. Ackerman, 444 U.S. 193 (1979) and Polk County v. Dodson, 459 U.S. 312 (1981), in which it was made very clear that Federal Defenders are subject to malpractice liability. This is due, of course, to the unique role held by criminal defense lawyers funded by the government. Contrary to most other government employees, our primary obligation is not to the government, but instead to individual clients in a

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professional attorney-client relationship. In addition, we work side-by-side, often in the same cases, with appointed counsel who are protected by malpractice insurance.

Current statutory law does not specifically address the unique problems of malpractice liability of federal defenders. There is no provision for legal representation and no provision for money judgment. The problem is magnified by the Ferri and Polk County decisions. One solution, to bring Federal Defenders under the Federal Tort Claims Act, we consider unacceptable. That arrangement would provide for defense of Federal Defenders in malpractice suits by the United States Department of Justice, would create a serious conflict, and also would potentially compromise the confidentiality of a defense file which would need to be reviewed by Justice Department attorneys in order to properly defend the Federal Defender attorneys. To leave Federal Defenders exclusively under a Federal Tort Claims Act remedy would also provide a disparity in remedies available to those persons with appointed counsel under the Criminal Justice Act as opposed to Federal Defenders. Co-defendants in the same case, one defendant represented by a Federal Defender and another by an appointed CJA counsel, would find that the remedies open to them for alleged malpractice would be considerably different since there would be no individual malpractice claim against the Federal Defender attorney.

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To some extent, the absence of statutory provision for malpractice liability may cause attorneys to "be on their toes." It may also cause some motions to be filed or decisions to be made out of an overabundance of caution. The absence of coverage discriminates against a small segment of the legal profession. It also hampers recruitment of creative, bright, and vigorous attorneys necessary to the effective operation of the criminal justice system.

Whether a given person is appointed CJA attorney or an Assistant Federal Public Defender is, of course, a matter of chance at the appointment stage. These kinds of differences, while perhaps not classic constitutional equal protection problems, are serious problems which should be resolved by the provision of malpractice insurance or "hold harmless" arrangements by the Administrative Office for Federal Defender attorneys.

TRAINING FUNDS IN THE CJA APPROPRIATION

Since the Federal Public and Community Defenders operate under the judicial branch of the government, their training funds come through the appropriation of, and are administered by, the Federal Judicial Center. The Judicial Center appropriation, however, must provide training for all members and employees of the Federal Judiciary, and unanticipated

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needs for other elements of the judiciary can result in a sharp decrease in the availability of funds for Federal Defender organizations in any given year. On the other hand, the Department of Justice administers its own appropriated funds, and is therefore able to earmark specific money for training Assistant United States Attorneys, which assures a consistent and continuing training program. While we believe that the Federal Judicial Center has acted in good faith and with diligence on behalf of the Defenders, and has put on some fine programs for them, we believe that the Defenders should have control over their own training funds through the CJA appropriation.

This flexibility would also provide the opportunity for Federal Public and Community Defender Offices to provide additional training for Criminal Justice Act appointed counsel. As a general rule under the present system, CJA counsel are not permitted to attend programs funded by the Federal Judicial Center, even when no per diem or travel expenses are involved. This shift to the CJA appropriation would permit much closer cooperation between Defender offices and the private bar in upgrading the quality of representatin in the federal courts. We believe that this proposed change would create a new mechanism for upgrading the level of practice for CJA attorneys by including them in local training programs coordinated by the Federal Public and Community Defender offices.

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CONCLUSION

Mr. Chairman, on behalf of all of the Federal Public and Community Defenders in the United States, we thank you once again for the opportunity to present our views on these proposed amendments and to answer questions of members of the Subcommittee and staff. Please feel free to call upon us at any time if we may be of assistance in connection with this or any other federal criminal justice legislation.

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Mr. KASTENMEIER. Thank you very much, Mr. Dahlin.

Ms. Leadbetter.

Ms. LEADBETTER. Thank you, Mr. Chairman.

I also want to express my appreciation for being allowed to be here and state my views.

Since my written statement has already been made part of the record, I certainly won't read it. In addition, I think the views expressed by Judge MacBride in many respects overlapped the points that I was making. I will simply highlight a few points from my written testimony.

As you have stated, in my background I have seen this from both sides of the fence and, I would add, really from all three sides. I have acted as a prosecutor. I have served 3 years as a member of the Criminal Justice Act panel in our district. And I am currently not on the panel but serving on the court's Criminal Justice Act selection committee. So, I have seen the effect of the 1984 revisions in compensation in terms of the greatly increased quality of applicants to become members of the Criminal Justice Act panel.

If there are any questions in your minds about whether the 1984 revisions, which doubled the compensation rates, would have any effect on the quality of attorneys who want to be on the panel, I can tell you that in the Eastern District of Pennsylvania it has been dramatic. We were virtually flooded with persons asking to be put on the panel who were extremely well qualified this year. We had to reject some applications by qualified counsel because we had more than would ever be appointed. Under the guidelines submitted by our court in terms of how many people we could put on the panel, there were some people who were competent attorneys that we just had to say no to because we had so many really outstanding candidates.

I believe there are several very important points of this legislation. As I stated in my written testimony, I think that it is a very salutary change to go from a system which overcompensates or more greatly compensates courtroom activity to one which provides for equal pay for out-of-court work and in-court work. I know, I have been a trial lawyer for almost 15 years, and I know that there is not a trial lawyer alive who doesn't have a gigantic ego and who doesn't believe that it is his or her fancy footwork in the courtroom and brilliance in speaking to the jury that wins or loses cases. But in our hearts we all know that that is a lot of baloney. It is the hard work you do before you go into that courtroom that wins or loses cases and not how clever you are on the spot.

Federal prosecutions today are not simple cases. They tend to be complex cases. They tend to involve a lot of documents. And you can't do that on extemporaneous brilliance. You have to know the case cold before you walk in there. You have to look at the documents. You have to analyze them. You have to think about them. You have to know your theories. You have to know what questions are going to be asked of those witnesses. Sometimes you have to review hundreds of transcripts of tape recordings. You have to be prepared or you're lost.

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I will relate one example. One of the first Criminal Justice Act cases that I was appointed to as a member of our panel was probably the most successful criminal defense that I have ever mounted. In that case I did not say one word in front of the jury. I prepared the [illegible] I knew my case. It was a multidefendant drug case. I knew that my client's best defense was for me to hide and try to hide him in the background.

There was one question that I wanted to ask on cross-examination of one Government witness, and I fed it to one of my cocounsel who buried it in his lengthy cross-examination. At an appropriate point in the middle of the trial I filed a written motion before the judge to exclude one of the Government witnesses who was going to directly incriminate my client. That motion had ample precedent in third circuit case law and was granted by the district court. So, that witness never appeared, and I didn't have to cross-examine him. At the end of the Government's case, there had not been one word said incriminating my client, nor had I said anything; and I am sure the jury wondered why I was sitting there. My client was excused at the end of the Government's case and a judgment of acquittal granted in his favor by the court. And we walked out of the courtroom.

Now, that was 2 full weeks sitting in the courtroom. It took a lot of my time in the courtroom. But I did absolutely nothing while there. I did my work before trial, and I got as complete a success as could have been obtained. If I had done nothing beforehand and depended on making some presentation to the jury, I am not sure what his chances would have been. I couldn't have done any better, and I probably would have done a lot worse for him.

I cannot overemphasize the importance of preparation to the trial attorney. I think this new system gives the emphasis where it deserves.

I have also pointed out that, while the Administrative Office calculates that it will create some additional expenditure over the present 64-rate structure, that that could be substantially mitigated because to the extent you deemphasize courtroom time, you are saving not only the time of a Federal judge but you're saving court reporters' time, Federal marshals' time, other expenses that the Government will necessarily have when a courtroom is open, say, for oral argument on a motion that ought to be decided on the papers.

I think the most important thing about the ceilings is that an increase in them will reduce an awful lot of unnecessary paperwork. The proposed ceilings would allow excess compensation only where the total amount of time spent by an attorney exceeds approximately 2½ weeks. Anyone who is trying cases in Federal court routinely these days knows that 2½ weeks for pretrial preparation, pretrial motions, trial and sentencing certainly does not reflect a complex or extended prosecution. It is a routine case. And there is really no reason for engaging in a lot of paperwork on a fee petition for a case at that level.

I think probably the most important change in this legislation is the increase in allowances for experts. One of the questions addressed to Judge MacBride had to do with whether the substantive changes in the 1984 Criminal Code revisions had any relationship

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to the changes which are presented today. I think in the area of expert compensation, there is one very important change, because in the 1984 substantive revisions the burden of proof in an insanity defense has now been placed upon the defendant. I don't know what the rates are on a nationwide basis, but I can tell you that you cannot get even a competent psychiatric evaluation and report, let alone any expert testimony, for under $500 or $600 in the city of Philadelphia. So, if a defendant is going to have to bear the burden of proof on a psychiatric defense, he is going to have to have more than $300 currently allowed for his attorney to go out and hire a psychiatrist.

I have addressed the aspects of this change with respect to other experts in my written comments.

I see that I have now gone over my 5 minutes that I promised to stick with. I will simply again thank you for allowing me to be here. I offer to answer any questions that anyone may have.

[Statement of Bonnie Brigance Leadbetter follows:]

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TESTIMONY OF BONNIE BRIGANCE LEADBETTER, ESQUIRE
REPRESENTING THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION
ON THE CRIMINAL JUSTICE ACT REVISIONS OF 1985, H.R.
BEFORE THE SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES AND THE
ADMINISTRATION OF JUSTICE OF THE COMMITTEE ON THE JUDICIARY,
UNITED STATES HOUSE OF REPRESENTATIVES

July 25, 1985

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Good Morning Mr. Chairman:

I am pleased to be here today representing the National Legal Aid and Defender Association in support of House Bill No. _____, the Criminal Justice Act Revisions of 1985. I think a number of the proposed revisions in this bill deserve comment.

One of the significant changes in this legislation would be to eliminate the discrepancy between compensation for time spent in court and time spent out of court. This is a salutary change which largely brings the Criminal Justice Act framework into conformity with current standards in the practice of law. Few private attorneys maintain such a distinction for their hourly rate clients and modern trends toward efficiency in litigation have systematically cut back on unnecessary courtroom time once considered de rigueur (e.g., submission of pure legal issues on briefs in favor of oral argument, status and scheduling discussions by telephone conference call, etc.) Most important, it encourages (by more justly compensating) careful pretrial preparation. Thorough preparation results not only in a better defense for the accused (or other represented individual) but also serves the overall administration of justice in a number of ways. If the government's case is strong and defense counsel has a thorough understanding of that case, guilty pleas are more likely. Even in cases where a trial is necessary, thorough preparation can often yield stipulations concerning issues which are not in dispute and would be time consuming to present in the manner required by the rules of evidence. In cases involving complex and extensive documents, well

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founded stipulations can often eliminate hours or days of undisputed background or authentication necessary either to establish technical elements of the offense or to lay groundwork for later evidence which goes to the heart of guilt or innocence. However, defense counsel is in no position to enter into stipulations regarding such testimony until he or she has a thorough knowledge of both the government and defense cases. Careful preparation further expedites trial by promoting clear, well-organized presentation of evidence. Elimination of unnecessary trial time saves judicial resources and cuts wasted costs of operating a courtroom, including jurors' fees, court reporter costs and U.S. Marshall time. Thus, although the new compensation formula is expected to increase the expenditure for counsel fees, the actual costs of the change should be significantly offset by other cost savings. Besides efficiency, justice is served because a better prepared case will be better presented and, therefore, decided by a factfinder with a clearer knowledge of the issues.

Allowing hourly rate variations among districts is a practical recognition of the fact that both the cost of living and the prevailing hourly rate for private attorneys varies substantially in different parts of our country. Thus a nationwide CJA rate of $50 (or the current $60/40) will necessarily be more attractive in lower cost areas where the figure more closely approaches prevailing rates. In those areas, then, it could be expected that the CJA panel would reflect a higher level of qualifications and experience than would be reflected in high-cost areas where CJA rates are further from

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prevailing rates and therefore, less attractive. Under a nationwide flat rate, the level of representation afforded by the CJA panel is likely to be lower in the very parts of the country where criminal defendants can least afford the alternative of retaining private counsel. Without addressing Constitutional implications of a system which provides a lower standard of CJA representation for people in certain parts of the country, such a scheme obviously runs counter to the fundamental purposes of the Criminal Justice Act.

Subsequent automatic adjustment of the CJA compensation rate by the Judicial Conference on an annual basis (after the first three years) serves the salutary purpose of keeping the compensation level up to the standard intended by this legislation without taking up the time and energy of Congress to do nothing more than recognize changes in the Consumer Price Index.

The primary effect of increasing the case compensation maximums will be to eliminate unnecessary paperwork both by CJA attorneys and by the Chief Judges of the Circuits. Current ceilings allow only approximately five days of attorney time for pretrial preparation, pretrial motions, trial, post trial motions and sentencing in felony cases. Even the simplest felonies can rarely be professionally handled within such time limits, and current trends in federal prosecution toward white collar crime, fraud and major complex drug organizations yield few simple indictments. The proposed $5,000 felony limit at current CJA rates allows for approximately two and one-half weeks of attorney time for preparation, trial, etc. Thus, the proposed

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limits should cover simple felony cases, but will still require approval in even moderately complex cases. While experience suggests that compensation in excess of the ceiling will be granted by the Court when appropriate, it makes no sense for CJA attorneys to be required to write memos justifying excess compensation in virtually all cases, nor to require the Chief Judges of our Circuits - already overburdened with caseloads and administrative responsibilities - to read them. The proposed changes strike an appropriate balance.

Perhaps the most important proposed change is the increased limit for investigative, expert and other services. As an Assistant United States Attorney, I was accustomed to having a wealth of litigation support services at my fingertips. The cost of such services - and learning to do without because of most clients' inability to afford them - was one of the greatest changes in my transition to private practice. Most of these services fall into three basic categories: 1) the work of private investigators; 2) testing, evaluation and testimony by experts; and 3) preparation of analytical and demonstrative aids and evidence, such as computerization of records, transcription of tape recordings, and preparation of charts, graphs, photographs and blow-ups. Even the most nominal of such services cannot be obtained for under $150 and the present limit of $300 will pay for only the simplest investigative task or demonstrative aid. It will not begin to pay for a psychiatric evaluation, let alone any expert testimony in court. Such services are certainly not necessary in every case, but when they are needed, they are indispensable. Moreover, appropriately utilized,

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litigation support services allow the CJA attorney to use his time more efficiently with concurrent savings in counsel fees.. The proposed limits of $300 without prior approval and $1,000 when pre-approved by the Court provide a realistic level of support for the court appointed attorney with appropriate safeguards against unnecessary spending.

For these reasons, I urge passage of the proposed amendments.

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Mr. KASTENMEIER. Thank you both for your testimony this morning.

On the very last point, Ms. Leadbetter, $150 to $300 seems reasonable—$300 to $1,000—there may be a feeling that the $1,000 becomes the standard and we are, as in medicine, tending to overcompensate people because it is pretty hard to deny professionals or other types of expert witness. If it's possible for them to be allowed $1,000, $1,000 will be sought.

Do you think that is necessary, that is to say, to go from $300 to $1,000?

Ms. LEADBETTER. I think it is difficult to put a specific price tag on it because it covers such a wide range of activities. Certainly it is not necessary to spend $1,000 in a routine investigative effort. I think when you are talking about investigators, you can come in under $300 in many cases. If you are talking about experts such as psychiatrists, doctors, accountants, you really can't get very much for $300. A psychiatrist cannot meet with a person for 5 minutes and give a competent evaluation to the court. He has to spend several hours at least, unless he has been the treating psychiatrist who has known the man all along. But assuming that the man has never had psychiatric treatment in the past and you need an evaluation, you need several hours of a psychiatrist's time. You simply cannot purchase doctors' time for less than, say, $100 an hour. When you are talking about in-court testimony, you are usually talking about a minimum charge of $500 for half a day.

The rates may be excessive, but there is no way that the court can tell a doctor how much he has to charge.

Mr. KASTENMEIER. Mr. Dahlin, I was interested in the example you used at the outset about the necessity for material witnesses to be represented. Why would Judge MacBride or any other judge put an alien drug smuggler out on bail, presumably represented by somebody, and while at the same time confining a material witness who was not represented, but if he or she had been represented, would free such a person?

Mr. DAHLIN. He wouldn't necessarily free the person. Speaking directly, though, to——

Mr. KASTENMEIER. I mean, that's the way it appeared, though.

Mr. DAHLIN. Sir?

Mr. KASTENMEIER. That's the way it appeared from your presentation.

Mr. DAHLIN. Perhaps I need to correct that. The material witness, of course, would probably still be placed in custody initially. I don't think there would be any difference as to that point. But if they are represented by counsel, counsel will be pressing initially to have a determination made to make sure that depositions are taken and that they are taken promptly within the provisions in the law, so that some of the material witnesses then may be released, forcing the government, forcing the prosecutor to designate the material witnesses that they intend to use or that they are going to need in the prosecution and forcing them to make that election, so that depositions may be taken and witnesses released. And also just in a mechanical sense, even if those things had been accomplished, if the material witnesses are represented by counsel,

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that counsel is going to make sure that they are released immediately when they are no longer needed.

Mr. KASTENMEIER. But there's nothing, if unrepresented, that the material witness can do on his or her own account to expedite his or her liberation from custody?

Mr. DAHLIN. They are dependent on perhaps the court, but there is no one to represent them. If they are unrepresented, there is no one looking out specifically for their interests and their early release.

Mr. KASTENMEIER. Let me ask you both a general question. You heard Judge MacBride testify. You are familiar with the proposal which is H.R. 3004. In any respect, do you have any reservations or differences, with the full and complete testimony of Judge MacBride, or with the text of the bill as you know it? I know that generally, presumably, you support both. You support the bill in general, and you probably agree certainly in general with Judge MacBride's remarks. I am trying to ascertain whether there are subtle distinctions anyone cares to make in connection with either the bill or the preceding remarks that you have heard.

Ms. LEADBETTER. There is one comment that I would make. It has to do with something that has been the case under the Criminal Justice Act ever since it was enacted and that I think is a mistake. That is in terms of the case ceilings, placing the habeas corpus function and section 2255, which is the Federal case habeas, in the same category as violations of probation, representation of witnesses and other parts of the criminal justice system which tend to be brief court appearances and very little else. The maximum up until last year for habeas corpus representation of a defendant was $250. They are now $500 and under the proposals would be $1,000.

I do not know whether that is because of a lack of understanding of the usual course of a habeas corpus proceeding or for what reason. In the usual habeas corpus proceeding, an attorney is appointed to mount a collateral attack on a conviction for a defendant whom he usually did not represent at trial. That attorney must then review the transcript of the trial, review any appeals, direct appeals which resulted from the trial, do legal research, do briefing for the court and often appear at an evidentiary hearing before the district court. This takes an awful lot more time than a simple violation of probation matter.

It is much more in line with the kind of work that is required on a direct appeal, although it often involves more time than a direct appeal, because it often involves an evidentiary hearing, and because the attorney on a direct appeal tends most often to have been the trial attorney. At least in the third circuit the circuit routinely reappoints trial counsel as appeal counsel in a CJA case, where in the habeas corpus situation it is almost never the trial counsel. So, he must review the trial record de novo, do the legal research, and often go to a hearing before the court.

To have a ceiling on habeas corpus which is only a third of the ceiling for a direct criminal appeal simply makes no sense in light of what habeas corpus usually involves. That is the only thing about the new act that I find out of proportion and would comment on.

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Mr. KASTENMEIER. It is the only thing—and I say this certainly not out of experience but just to draw out your conclusion. Are you speaking of all habeas corpus cases or some habeas corpus cases? The point I am making is that some are considered rather routine. That is to say, they are essentially, at least in the crudest form, sort of just a restatement of something, frankly, already advanced, even though they are supposed to be somewhat different.

I guess my point is, would all habeas corpus cases be as complex and as difficult and time consuming for a counsel as one that you just described?

Ms. LEADBETTER. Yes, they would be. Certainly many of them turn out to be meritless, but an attorney cannot assess the fact that they are meritless until after he has read the transcript of the trial and possibly done some legal research.

Often direct appeals are totally meritless but are taken because the defendant thinks he has nothing to lose and in fact does have nothing to lose and strongly wants to press an appeal. That doesn't mean the lawyer doesn't have to do the work to present the best case to the court. In fact, sometimes when you have to search for an issue to present, you have to do more work than when the issues are self-evident.

I think that the analogy to a direct appeal is a pretty good analogy. Certainly, many are meritless but the amount of work and the kinds of review that the lawyer has to do are very similar.

Mr. KASTENMEIER. And you would say that that is the case irrespective of the fact that it is conceivable there could be some reform in habeas corpus coming along at some point?

Ms. LEADBETTER. Well, I guess that would depend on what the reform would be. Certainly there is no reason that an attorney must go to the ceiling in every case. In many cases they do not.

Mr. KASTENMEIER. Mr. Dahlin, do you have any comment either on the preceding testimony or on H.R. 3004?

Mr. DAHLIN. I would second Ms. Leadbetter's comments.

I would address one point, something that is not addressed in the bill but refers to Congressman Berman's comment. That is the question of pay for the Federal defender. I am not talking about deputies or assistants.

The current wording is that compensation of the Federal Public Defender cannot exceed that of the U.S. attorney but there is no statutory provision for parity. The argument that Judge MacBride mentioned that is usually cited is that the U.S. attorney's office is larger in terms of people. They may have a lands division and a civil division, a forfeiture division, et cetera. It seems to me that the emphasis on that point—and again this is not addressed in these amendments. But the emphasis there should be that the Federal defender in an adversary system has a comparable responsibility to the U.S. attorney in the significance of his role in the adversary system.

Mr. KASTENMEIER. As one engaged in prosecution, you agree that prosecutors are not in a good or as good a position to certify defense witnesses as, say, public defenders or other defense attorneys?

Mr. DAHLIN. I think that ought to be up to the Federal defender, clearly. There can be a conflict. We certainly have experienced in

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our district, not so much currently but certainly in the past, that the assistant U.S. attorney on the case, may resent the fact that you have done an effective job or may be smarting, for whatever reasons, and will drag his feet. And that is inappropriate. I think witnesses, they are witnesses of the court, really, they are appearing before the court and should be treated courteously and with dispatch. And I think that is more likely to happen if the Federal defender has that authority.

Mr. KASTENMEIER. On behalf of the committee, I want to thank you both, Ms. Leadbetter and Mr. Dahlin, for your very helpful testimony this morning.

Obviously, as a sponsor of this bill, I am hopeful that the committee can move it forward. We will take your own expert testimony in support of it as a major aid in achieving that result. Thank you very much.

This concludes the hearing this morning. The committee stands adjourned until next Monday at 2 o'clock.

[Whereupon, at 11:50 a.m., the subcommittee was adjourned.]

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Appendixes

I

99TH CONGRESS
1ST SESSION

H. R. 3004

To amend section 3006A of title 18, United States Code, to improve the delivery of legal services in the criminal justice system to those persons financially unable to obtain adequate representation, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 16, 1985

Mr. KASTENMEIER (for himself and Mr. MOORHEAD) (by request) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend section 3006A of title 18, United States Code, to improve the delivery of legal services in the criminal justice system to those persons financially unable to obtain adequate representation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Criminal Justice Act Revision of 1985".

SEC. 2. AMENDMENTS TO CRIMINAL JUSTICE ACT.

(a) IN GENERAL.—Section 3006A of title 18, United States Code, is amended as follows:

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(1) Subsection (a) is amended by striking out "(1) who is" and all that follows through "subsection (h)." and inserting in lieu thereof the following: "in accordance with this section. Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate representation. Each plan shall provide the following:

"(1) Representation shall be provided for any financially eligible person who—

"(A) is charged with a felony or a misdemeanor (other than a petty offense as defined in section 1 of this title);

"(B) is a juvenile alleged to have committed an act of juvenile delinquency as defined in section 5031 of this title;

"(C) is charged with a violation of probation;

"(D) is under arrest, when such representation is required by law;

"(E) is entitled to appointment of counsel in parole proceedings under chapter 311 of this title;

"(F) is subject to a mental competency hearing under chapter 313 of this title;

"(G) is in custody as a material witness;

"(H) is entitled to appointment of counsel under the sixth amendment to the Constitution; or

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"(I) faces loss of liberty in a case, and Federal law requires the appointment of counsel.

"(2) Whenever the United States magistrate or the court determines that the interests of justice so require, representation may be provided for any financially eligible person who—

"(A) is charged with a petty offense for which a sentence to confinement is authorized; or

"(B) is seeking relief under section 2241, 2254, or 2255 of title 28.

"(3) Private attorneys shall be appointed in a substantial proportion of the cases. Each plan may include, in addition to the provisions for private attorneys, either of the following or both:

"(A) Attorneys furnished by a bar association or a legal aid agency.

"(B) Attorneys furnished by a defender organization established in accordance with the provisions of subsection (g).".

(2) Subsection (b) is amended—

(A) in the second sentence—

(i) by striking out "In every criminal case" and all that follows through "violation of probation and" and inserting in lieu thereof "In every case in which a person entitled

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to representation under a plan approved under subsection (a)"; and

(ii) by striking out "defendant"; and inserting in lieu thereof "person";

(B) in the third sentence by striking out "defendant" each place it appears and inserting in lieu thereof "person"; and

(C) in the fifth sentence by striking out "defendants" and inserting in lieu thereof "persons".

(3)(A) Subsection (d)(1) is amended by striking out "not exceeding $60" and all that follows through "Such attorney" and inserting in lieu thereof the following: "not in excess of $50 per hour, unless the Judicial Conference determines that a higher rate of not in excess of $75 per hour is justified for a circuit or for particular districts within a circuit, for time expended in court or before a United States magistrate and for time expended out of court. The Judicial Conference may develop guidelines for determining the maximum hourly rates for each circuit in accordance with the preceding sentence, with variations by district, where appropriate, taking into account such factors as the minimum range of the prevailing hourly rates for qualified attorneys in the district in which the representation is provided and the recommendations of the judi-

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cial councils of the circuits. Not less than 3 years after the effective date of the Criminal Justice Act Revision of 1985, the Judicial Conference is authorized to raise the maximum hourly rates specified in this paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay under the General Schedule made pursuant to section 5305 of title 5 on or after such effective date. After the rates are raised under the preceding sentence, such maximum hourly rates may be raised at intervals of not less than 1 year each, up to the aggregate of the overall average percentages of such adjustments made since the last raise was made under this paragraph. Attorneys".

(B) Subsection (d)(2) is amended—

(i) in the first sentence—

(I) by striking out "$2,000" and inserting in lieu thereof "$5,000"; and

(II) by striking out "$800" and inserting in lieu thereof "$1,500";

(ii) in the second sentence by striking out "$2,000" and inserting in lieu thereof "$3,000"; and

(iii) by striking out the third sentence and inserting in lieu thereof the following: "For any other representation required or authorized by this

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section, the compensation shall not exceed $1,000 for each attorney in each proceeding.".

(C) Subsection (d)(3) is amended by striking out "for extended or complex representation".

(D) Subsection (d)(4) is amended in the first sentence by striking out "represented the defendant" and inserting in lieu thereof "provided representation to the person involved".

(4)(A) Subsection (e)(1) is amended in the first sentence by striking out "an adequate defense" and inserting in lieu thereof "adequate representation".

(B) Subsection (e)(2) is amended to read as follows:

"(2) WITHOUT PRIOR REQUEST.—(A) Counsel appointed under this section may obtain, subject to later review, investigative, expert, and other services without prior authorization if necessary for adequate representation. Except as provided in subparagraph (B) of this paragraph, the total cost of services obtained without prior authorization may not exceed $300 and expenses reasonably incurred.

"(B) The court, or the United States magistrate, if the services were rendered in a case disposed of entirely before the United States magistrate, may, in the interest of justice, and upon the finding that timely procurement of necessary services could not await prior authorization, approve pay-

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ment for such services after they have been obtained, even if the cost of such services exceeds $300.".

(C) Subsection (e)(3) is amended by striking out "$300" and inserting in lieu thereof "$1,000".

(5)(A) Subsection (h)(2)(A) is amended by striking out ", similarly as under title 28, United States Code, section 605, and subject to the conditions of that section" and inserting in lieu thereof "in accordance with section 605 of title 28".

(B) Subsection (h)(2)(B) is amended in the third sentence by striking out "coming" and inserting in lieu thereof "next fiscal".

(C) Subsection (h) is amended by adding at the end the following:

"(3) MALPRACTICE AND NEGLIGENCE SUITS.—The Director of the Administrative Office of the United States Courts shall, to the extent the Director considers appropriate, provide representation for and hold harmless, or provide liability insurance for, any person who is an officer or employee of either a Federal Public Defender Organization, or a Community Defender Organization receiving periodic sustaining grants, which is established under this subsection, for money damages for injury, loss of liberty, loss of property, or personal injury or death arising from malprac-

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tice or negligence of any such officer or employee in furnishing representational services under this section while acting within the scope of that person's office or employment.".

(6) Subsection (j) is amended by inserting immediately before the period at the end of the first sentence the following: ", including funds for the continuing education and training of persons providing representational services under this section".

(7) Subsection (l) is amended—

(A) by striking out ", other than subsection (h) of section 1,"; and

(B) by striking out "Act" each place it appears and inserting in lieu thereof "section".

(b) TECHNICAL AMENDMENTS.—

(1) Section 3006A of title 18, United States Code, is amended by striking out subsection (g) and redesignating subsections (h) through (l) as subsections (g) through (k), respectively.

(2) Subsection (j) of section 3006A of such title, as redesignated by paragraph (1), is amended to read as follows:

"(j) DISTRICTS INCLUDED.—As used in this section, the term 'district court' means each district court of the United States created by chapter 5 of title 28, the District

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Court of the Virgin Islands, the District Court for the Northern Mariana Islands, and the District Court of Guam.".

SEC. 3. AMENDMENTS TO COMPREHENSIVE CRIME CONTROL ACT OF 1984.

Section 223(e) of the Comprehensive Crime Control Act of 1984 (Public Law 98–473; 98 Stat. 2028) is amended to read as follows:

"(e) Section 3006A(a) is amended—

"(1) in paragraph (1)(A) by striking out 'misdemeanor (other than a petty offense as defined in section 1 of this title)' and inserting in lieu thereof 'Class A misdemeanor';

"(2) in paragraph (1) by striking out subparagraph (E) and redesignating subparagraphs (F) through (I) as subparagraphs (E) through (H), respectively; and

"(3) in paragraph (2)(A) by striking out 'petty offense' and inserting in lieu thereof 'Class B or C misdemeanor, or an infraction,'.".

SEC. 4. WITNESS FEES.

Section 1825 of title 28, United States Code, is amended to read as follows:

"§ 1825. Payment of fees

"(a) In any case in which the United States or an officer or agency of the United States is a party, the United States marshal for the district shall pay all fees of witnesses on the

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certificate of the United States attorney or assistant United States attorney, and in the proceedings before a United States magistrate, on the certificate of such magistrate, except that any fees of defense witnesses, other than experts, appearing pursuant to subpoenas issued upon approval of the court, shall be paid by the United States marshal for the district—

"(1) on the certificate of a Federal public defender or assistant Federal public defender, in a criminal case in which the defendant is represented by such Federal public defender or assistant Federal public defender, and

"(2) on the certificate of the clerk of the court upon the affidavit of such witnesses' attendance given by other counsel appointed pursuant to section 3006A of title 18, in a criminal case in which a defendant is represented by such other counsel.

"(b) In proceedings in forma pauperis for a writ of habeas corpus, and in proceedings in forma pauperis under section 2255 of this title, the United States marshal for the district shall pay, on the certificate of the district judge, all fees of witnesses for the party authorized to proceed in forma pauperis, except that any fees of witnesses for such party, other than experts, appearing pursuant to subpoenas issued

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upon approval of the court, shall be paid by the United States marshal for the district—

"(1) on the certificate of a Federal public defender or assistant Federal public defender, in any such proceedings in which a party is represented by such Federal public defender or assistant Federal public defender, and

"(2) on the certificate of the clerk of the court upon the affidavit of such witnesses' attendance given by other counsel appointed pursuant to section 3006A of title 18, in any such proceedings in which a party is represented by such other counsel.

"(c) Fees and mileage need not be tendered to a witness upon service of a subpoena issued on behalf of the United States or an officer or agency of the United States, upon service of a subpoena issued on behalf of a defendant represented by a Federal public defender, assistant Federal public defender, or other attorney appointed pursuant to section 3006A of title 18, or upon service of a subpoena issued on behalf of a party authorized to proceed in forma pauperis, if the payment of such fees and mileage is to be made by the United States marshal under this section.".

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SEC. 5. EFFECTIVE DATE.

The amendments made by this Act shall take effect on October 1, 1985, or 120 days after the date of the enactment of this Act, whichever is later.

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Union Calendar No. 252

99TH CONGRESS
1ST SESSION

H. R. 3004

[Report No. 99-417]

To amend section 3006A of title 18, United States Code, to improve the delivery of legal services in the criminal justice system to those persons financially unable to obtain adequate representation, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 16, 1985

Mr. KASTENMEIER (for himself and Mr. MOORHEAD) (by request) introduced the following bill; which was referred to the Committee on the Judiciary

DECEMBER 5, 1985

Additional sponsors: Mr. LEACH of Iowa, Mr. VISCLOSKY, Mr. GALLO, Mr. DURBIN, Mr. LEVIN of Michigan, Mr. LIGHTFOOT, Mr. BROOKS, Mr. GRAY of Illinois, Mr. BOSCO, Mr. CONTE, Mr. BUSTAMANTE, Mr. GEJDENSON, Mrs. KENNELLY, and Mr. OBEY

DECEMBER 5, 1985

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Strike out all after the enacting clause and insert the part printed in italic]

[For text of introduced bill, see copy of bill as introduced on July 16, 1985]

A BILL

To amend section 3006A of title 18, United States Code, to improve the delivery of legal services in the criminal justice system to those persons financially unable to obtain adequate representation, and for other purposes.

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Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Criminal Justice Act Revision of 1985".

SEC. 2. AMENDMENTS TO CRIMINAL JUSTICE ACT.

(a) IN GENERAL.—Section 3006A of title 18, United States Code, is amended as follows:

(1) Subsection (a) is amended by striking out "(1) who is" and all that follows through "subsection (h)." and inserting in lieu thereof the following: "in accordance with this section. Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate representation. Each plan shall provide the following:

"(1) Representation shall be provided for any financially eligible person who—

"(A) is charged with a felony or a misdemeanor (other than a petty offense as defined in section 1 o, this title);

"(B) is a juvenile alleged to have committed an act of juvenile delinquency as defined in section 5031 of this title;

"(C) is charged with a violation of probation;

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"(D) is under arrest, when such representation is required by law;

"(E) is entitled to appointment of counsel in parole proceedings under chapter 311 of this title;

"(F) is subject to a mental condition hearing under chapter 313 of this title;

"(G) is in custody as a material witness;

"(H) is entitled to appointment of counsel under the sixth amendment to the Constitution; or

"(I) faces loss of liberty in a case, and Federal law requires the appointment of counsel.

"(2) Whenever the United States magistrate or the court determines that the interests of justice so require, representation may be provided for any financially eligible person who—

"(A) is charged with a petty offense for which a sentence to confinement is authorized; or

"(B) is seeking relief under section 2241, 2254, or 2255 of title 28.

"(3) Private attorneys shall be appointed in a substantial proportion of the cases. Each plan may include, in addition to the provisions for private attorneys, either of the following or both:

"(A) Attorneys furnished by a bar association or a legal aid agency.

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"(B) Attorneys furnished by a defender organization established in accordance with the provisions of subsection (g).".

(2) Subsection (b) is amended—

(A) in the second sentence—

(i) by striking out "In every criminal case" and all that follows through "violation of probation and" and inserting in lieu thereof "In every case in which a person entitled to representation under a plan approved under subsection (a)"; and

(ii) by striking out "defendant"; and inserting in lieu thereof "person";

(B) in the third sentence by striking out "defendant" each place it appears and inserting in lieu thereof "person"; and

(C) in the fifth sentence by striking out "defendants" and inserting in lieu thereof "persons".

(3)(A) Subsection (d)(1) is amended by striking out "not exceeding $60" and all that follows through "Such attorney" and inserting in lieu thereof the following: "not in excess of $50 per hour, unless the Judicial Conference determines that a higher rate of not in excess of $75 per hour is justified for a circuit or for particular districts within a circuit, for time ex-

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pended in court or before a United States magistrate and for time expended out of court. The Judicial Conference may develop guidelines for determining the maximum hourly rates for each circuit in accordance with the preceding sentence, with variations by district, where appropriate, taking into account such factors as the minimum range of the prevailing hourly rates for qualified attorneys in the district in which the representation is provided and the recommendations of the judicial councils of the circuits. Not less than 3 years after the effective date of the Criminal Justice Act Revision of 1985, the Judicial Conference is authorized to raise the maximum hourly rates specified in this paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay under the General Schedule made pursuant to section 5305 of title 5 on or after such effective date. After the rates are raised under the preceding sentence, such maximum hourly rates may be raised at intervals of not less than 1 year each, up to the aggregate of the overall average percentages of such adjustments made since the last raise was made under this paragraph. Attorneys".

(B) Subsection (d)(2) is amended—

(i) in the first sentence—

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(I) by striking out "$2,000" and inserting in lieu thereof "$5,000"; and

(II) by striking out "$800" and inserting in lieu thereof "$1,500";

(ii) in the second sentence by striking out "$2,000" and inserting in lieu thereof "$3,000"; and

(iii) by striking out the third sentence and inserting in lieu thereof the following: "For any other representation required or authorized by this section, the compensation shall not exceed $1,000 for each attorney in each proceeding.".

(C) Subsection (d)(3) is amended by striking out "for extended or complex representation".

(D) Subsection (d)(4) is amended in the first sentence by striking out "represented the defendant" and inserting in lieu thereof "provided representation to the person involved".

(4)(A) Subsection (e)(1) is amended in the first sentence by striking out "an adequate defense" and inserting in lieu thereof "adequate representation".

(B) Subsection (e)(2) is amended to read as follows:

"(2) WITHOUT PRIOR REQUEST.—(A) Counsel appointed under this section may obtain, subject to later review,

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investigative, expert, and other services without prior authorization if necessary for adequate representation. Except as provided in subparagraph (B) of this paragraph, the total cost of services obtained without prior authorization may not exceed $300 and expenses reasonably incurred.

"(B) The court, or the United States magistrate, if the services were rendered in a case disposed of entirely before the United States magistrate, may, in the interest of justice, and upon the finding that timely procurement of necessary services could not await prior authorization, approve payment for such services after they have been obtained, even if the cost of such services exceeds $300.".

(C) Subsection (e)(3) is amended by striking out "$300" and inserting in lieu thereof "$1,000".

(5)(A) Subsection (h)(2)(A) is amended by striking out ", similarly as under title 28, United States Code, section 605, and subject to the conditions of that section" and inserting in lieu thereof "in accordance with section 605 of title 28".

(B) Subsection (h)(2)(B) is amended in the third sentence by striking out "coming" and inserting in lieu thereof "next fiscal".

(C) Subsection (h) is amended by adding at the end the following:

"(3) MALPRACTICE AND NEGLIGENCE SUITS.—The Director of the Administrative Office of the United States Courts shall, to the extent the Director considers appropriate, provide representation for and hold harmless, or provide liability insurance for, any person who is an officer or employee of either a Federal Public Defender Organization, or a Community Defender Organization receiving periodic sustaining grants, which is established under this subsection, for money damages for injury, loss of liberty, loss of property, or personal injury or death arising from malpractice or negligence of any such officer or employee in furnishing representational services under this section while acting within the scope of that person's office or employment.".

(6) Subsection (j) is amended by inserting immediately before the period at the end of the first sentence the following: ", including funds for the continuing education and training of persons providing representational services under this section".

(7) Subsection (l) is amended—

(A) by striking out ", other than subsection (h) of section 1,"; and

(B) by striking out "Act" each place it appears and inserting in lieu thereof "section".

(b) TECHNICAL AMENDMENTS.—

(1) Section 3006A of title 18, United States Code, is amended by striking out subsection (g) and redesignating subsections (h) through (l) as subsections (g) through (k), respectively.

(2) Subsection (j) of section 3006A of such title, as redesignated by paragraph (1), is amended to read as follows:

"(j) DISTRICTS INCLUDED.—As used in this section, the term 'district court' means each district court of the United States created by chapter 5 of title 28, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, and the District Court of Guam.".

SEC. 3. AMENDMENTS TO COMPREHENSIVE CRIME CONTROL ACT OF 1984.

Section 223(e) of the Comprehensive Crime Control Act of 1984 (Public Law 98–473; 98 Stat. 2028) is amended to read as follows:

"(e) Section 3006A(a) is amended—

"(1) in paragraph (1)(A) by striking out 'misdemeanor (other than a petty offense as defined in section 1 of this title)' and inserting in lieu thereof 'Class A misdemeanor';

"(2) in paragraph (1) by striking out subparagraph (E) and redesignating subparagraphs (F)

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through (I) as subparagraphs (E) through (H), respectively; and

"(3) in paragraph (2)(A) by striking out 'petty offense' and inserting in lieu thereof 'Class B or C misdemeanor, or an infraction,'.".

SEC. 4. WITNESS FEES.

Section 1825 of title 28, United States Code, is amended to read as follows:

"§ 1825. Payment of fees

"(a) In any case in which the United States or an officer or agency of the United States is a party, the United States marshal for the district shall pay all fees of witnesses on the certificate of the United States attorney or assistant United States attorney, and in the proceedings before a United States magistrate, on the certificate of such magistrate, except that any fees of defense witnesses, other than experts, appearing pursuant to subpoenas issued upon approval of the court, shall be paid by the United States marshal for the district—

"(1) on the certificate of a Federal public defender or assistant Federal public defender, in a criminal case in which the defendant is represented by such Federal public defender or assistant Federal public defender, and

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"(2) on the certificate of the clerk of the court upon the affidavit of such witnesses' attendance given by other counsel appointed pursuant to section 3006A of title 18, in a criminal case in which a defendant is represented by such other counsel.

"(b) In proceedings in forma pauperis for a writ of habeas corpus, and in proceedings in forma pauperis under section 2255 of this title, the United States marshal for the district shall pay, on the certificate of the district judge, all fees of witnesses for the party authorized to proceed in forma pauperis, except that any fees of witnesses for such party, other than experts, appearing pursuant to subpoenas issued upon approval of the court, shall be paid by the United States marshal for the district—

"(1) on the certificate of a Federal public defender or assistant Federal public defender, in any such proceedings in which a party is represented by such Federal public defender or assistant Federal public defender, and

"(2) on the certificate of the clerk of the court upon the affidavit of such witnesses' attendance given by other counsel appointed pursuant to section 3006A of title 18, in any such proceedings in which a party is represented by such other counsel.

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"(c) Fees and mileage need not be tendered to a witness upon service of a subpoena issued on behalf of the United States or an officer or agency of the United States, upon service of a subpoena issued on behalf of a defendant represented by a Federal public defender, assistant Federal public defender, or other attorney appointed pursuant to section 3006A of title 18, or upon service of a subpoena issued on behalf of a party authorized to proceed in forma pauperis, if the payment of such fees and mileage is to be made by the United States marshal under this section.".

SEC. 5. EFFECTIVE DATE.

The amendments made by this Act shall take effect on October 1, 1986, or 120 days after the date of the enactment of this Act, whichever is later.

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99TH CONGRESS *1st Session* | HOUSE OF REPRESENTATIVES | REPORT 99-417

CRIMINAL JUSTICE ACT REVISION OF 1985

DECEMBER 5, 1985.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. KASTENMEIER, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 3004]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3004) to amend section 3006A of title 18, United States Code, to improve the delivery of legal services in the criminal justice system to those persons financially unable to obtain adequate representation, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Criminal Justice Act Revision of 1985".

SEC. 2. AMENDMENTS TO CRIMINAL JUSTICE ACT.

(a) IN GENERAL.—Section 3006A of title 18, United States Code, is amended as follows:

(1) Subsection (a) is amended by striking out "(1) who is" and all that follows through "subsection (h)." and inserting in lieu thereof the following: "in accordance with this section. Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate representation. Each plan shall provide the following:

"(1) Representation shall be provided for any financially eligible person who—

"(A) is charged with a felony or a misdemeanor (other than a petty offense as defined in section 1 of this title);

"(B) is a juvenile alleged to have committed an act of juvenile delinquency as defined in section 5031 of this title;

"(C) is charged with a violation of probation;

"(D) is under arrest, when such representation is required by law;

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"(E) is entitled to appointment of counsel in parole proceedings under chapter 311 of this title;

"(F) is subject to a mental condition hearing under chapter 313 of this title;

"(G) is in custody as a material witness;

"(H) is entitled to appointment of counsel under the sixth amendment to the Constitution; or

"(I) faces loss of liberty in a case, and Federal law requires the appointment of counsel.

"(2) Whenever the United States magistrate or the court determines that the interests of justice so require, representation may be provided for any financially eligible person who—

"(A) is charged with a petty offense for which a sentence to confinement is authorized; or

"(B) is seeking relief under section 2241, 2254, or 2255 of title 28.

"(3) Private attorneys shall be appointed in a substantial proportion of the cases. Each plan may include, in addition to the provisions for private attorneys, either of the following or both:

"(A) Attorneys furnished by a bar association or a legal aid agency.

"(B) Attorneys furnished by a defender organization established in accordance with the provisions of subsection (g).".

(2) Subsection (b) is amended—

(A) in the second sentence—

(i) by striking out "In every criminal case" and all that follows through "violation of probation and" and inserting in lieu thereof "In every case in which a person entitled to representation under a plan approved under subsection (a)"; and

(ii) by striking out "defendant"; and inserting in lieu thereof "person";

(B) in the third sentence by striking out "defendant" each place it appears and inserting in lieu thereof "person"; and

(C) in the fifth sentence by striking out "defendants" and inserting in lieu thereof "persons".

(3)(A) Subsection (d)(1) is amended by striking out "not exceeding $60" and all that follows through "Such attorney" and inserting in lieu thereof the following: "not in excess of $50 per hour, unless the Judicial Conference determines that a higher rate of not in excess of $75 per hour is justified for a circuit or for particular districts within a circuit, for time expended in court or before a United States magistrate and for time expended out of court. The Judicial Conference may develop guidelines for determining the maximum hourly rates for each circuit in accordance with the preceding sentence, with variations by district, where appropriate, taking into account such factors as the minimum range of the prevailing hourly rates for qualified attorneys in the district in which the representation is provided and the recommendations of the judicial councils of the circuits. Not less than 3 years after the effective date of the Criminal Justice Act Revision of 1985, the Judicial Conference is authorized to raise the maximum hourly rates specified in this paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay under the General Schedule made pursuant to section 5305 of title 5 on or after such effective date. After the rates are raised under the preceding sentence, such maximum hourly rates may be raised at intervals of not less than 1 year each, up to the aggregate of the overall average percentages of such adjustments made since the last raise was made under this paragraph. Attorneys".

(B) Subsection (d)(2) is amended—

(i) in the first sentence—

(I) by striking out "$2,000" and inserting in lieu thereof "$5,000"; and

(II) by striking out "$800" and inserting in lieu thereof "$1,500";

(ii) in the second sentence by striking out "$2,000" and inserting in lieu thereof "$3,000"; and

(iii) by striking out the third sentence and inserting in lieu thereof the following: "For any other representation required or authorized by this section, the compensation shall not exceed $1,000 for each attorney in each proceeding.".

(C) Subsection (d)(3) is amended by striking out "for extended or complex representation".

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(D) Subsection (d)(4) is amended in the first sentence by striking out "represented the defendant" and inserting in lieu thereof "provided representation to the person involved".

(4)(A) Subsectikn (e)(1) is amended in the first sentence by striking out "an adequate defense" and inserting in lieu thereof "adequate representation".

(B) Subsection (e)(2) is amended to read as follows:

"(2) WITHOUT PRIOR REQUEST.—(A) Counsel appointed under this section may obtain, subject to later review, investigative, expert, and other services without prior authorization if necessary for adequate representation. Except as provided in subparagraph (B) of this paragraph, the total cost of services obtained without prior authorization may not exceed $300 and expenses reasonably incurred.

"(B) The court, or the United States magistrate, if the services were rendered in a case disposed of entirely before the United States magistrate, may, in the interest of justice, and upon the finding that timely procurement of necessary services could not await prior authorization, approve payment for such services after they have been obtained, even if the cost of such services exceeds $300.".

(C) Subsection (e)(3) is amended by striking out "$300" and inserting in lieu thereof "$1,000".

(5)(A) Subsection (h)(2)(A) is amended by striking out ", similarly as under title 28, United States Code, section 605, and subject to the conditions of that section" and inserting in lieu thereof "in accordance with section 605 of title 28".

(B) Subsection (h)(2)(B) is amended in the third sentence by striking out "coming" and inserting in lieu thereof "next fiscal".

(C) Subsection (h) is amended by adding at the end the following:

"(3) MALPRACTICE AND NEGLIGENCE SUITS.—The Director of the Administrative Office of the United States Courts shall, to the extent the Director considers appropriate, provide representation for and hold harmless, or provide liability insurance for, any person who is an officer or employee of either a Federal Public Defender Organization, or a Community Defender Organization receiving periodic sustaining grants, which is established under this subsection, for money damages for injury, loss of liberty, loss of property, or personal injury or death arising from malpractice or negligence of any such officer or employee in furnishing representational services under this section while acting within the scope of that person's office or employment.".

(6) Subsection (j) is amended by inserting immediately before the period at the end of the first sentence the following: ", including funds for the continuing education and training of persons providing representational services under this section".

(7) Subsection (l) is amended—

(A) by striking out ", other than subsection (h) of section 1,"; and

(B) by striking out "Act" each place it appears and inserting in lieu thereof "section".

(b) TECHNICAL AMENDMENTS.—

(1) Section 3006A of title 18, United States Code, is amended by striking out subsection (g) and redesignating subsections (h) through (l) as subsections (g) through (k), respectively.

(2) Subsection (j) of section 3006A of such title, as redesignated by paragraph (1), is amended to read as follows:

"(j) DISTRICTS INCLUDED.—As used in this section, the term 'district court' means each district court of the United States created by chapter 5 of title 28, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, and the District Court of Guam.".

SEC. 3. AMENDMENTS TO COMPREHENSIVE CRIME CONTROL ACT OF 1984.

Section 223(e) of the Comprehensive Crime Control Act of 1984 (Public Law 98-473; 98 Stat. 2028) is amended to read as follows:

"(e) Section 3006A(a) is amended—

"(1) in paragraph (1)(A) by striking out 'misdemeanor (other than a petty offense as defined in section 1 of this title)' and inserting in lieu thereof 'Class A misdemeanor';

"(2) in paragraph (1) by striking out subparagraph (E) and redesignating subparagraphs (F) through (I) as subparagraphs (E) through (H), respectively; and

"(3) in paragraph (2)(A) by striking out 'petty offense' and inserting in lieu thereof 'Class B or C misdemeanor, or an infraction,'.".

SEC. 4. WITNESS FEES.

Section 1825 of title 28, United States Code, is amended to read as follows:

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"§1825. Payment of fees

"(a) In any case in which the United States or an officer or agency of the United States is a party, the United States marshal for the district shall pay all fees of witnesses on the certificate of the United States attorney or assistant United States attorney, and in the proceedings before a United States magistrate, on the certificate of such magistrate, except that any fees of defense witnesses, other than experts, appearing pursuant to subpoenas issued upon approval of the court, shall be paid by the United States marshal for the district—

"(1) on the certificate of a Federal public defender or assistant Federal public defender, in a criminal case in which the defendant is represented by such Federal public defender or assistant Federal public defender, and

"(2) on the certificate of the clerk of the court upon the affidavit of such witnesses' attendance given by other counsel appointed pursuant to section 3006A of title 18, in a criminal case in which a defendant is represented by such other counsel.

"(b) In proceedings in forma pauperis for a writ of habeas corpus, and in proceedings in forma pauperis under section 2255 of this title, the United States marshal for the district shall pay, on the certificate of the district judge, all fees of witnesses for the party authorized to proceed in forma pauperis, except that any fees of witnesses for such party, other than experts, appearing pursuant to subpoenas issued upon approval of the court, shall be paid by the United States marshal for the district—

"(1) on the certificate of a Federal public defender or assistant Federal public defender, in any such proceedings in which a party is represented by such Federal public defender or assistant Federal public defender, and

"(2) on the certificate of the clerk of the court upon the affidavit of such witnesses' attendance given by other counsel appointed pursuant to section 3006A of title 18, in any such proceedings in which a party is represented by such other counsel.

"(c) Fees and mileage need not be tendered to a witness upon service of a subpoena issued on behalf of the United States or an officer or agency of the United States, upon service of a subpoena issued on behalf of a defendant represented by a Federal public defender, assistant Federal public defender, or other attorney appointed pursuant to section 3006A of title 18, or upon service of a subpoena issued on behalf of a party authorized to proceed in forma pauperis, if the payment of such fees and mileage is to be made by the United States marshal under this section.".

SEC. 5. EFFECTIVE DATE.

The amendments made by this Act shall take effect on October 1, 1986, or 120 days after the date of the enactment of this Act, whichever is later.

STATEMENT

H.R. 3004 updates the Criminal Justice Act (CJA) (18 United States Code § 3006A), which provides a system of compensation to attorneys to enable them to represent persons who are financially unable to obtain adequate representation in Federal court on criminal and related matters. The primary impetus for the revision of the CJA comes from Federal judges through the Judicial Conference of the United States (Judicial Conference) which has indicated its concern that the compensation system presents a threat to the Congressional purpose of providing adequate representation under the Sixth Amendment to those individuals unable to reasonably afford defense services.

The Sixth Amendment to the U.S. Constitution guarantees defendants in criminal cases the right to effective assistance of counsel. If counsel is not competent, the integrity of the justice system is jeopardized. Innocent defendants may be wrongly convicted, and defendants inadequately represented may have their cases retried or dismissed, regardless of their culpability. It is therefore critical that qualified attorneys be encouraged to represent financially eligible defendants, and that adequate compensation be set to insure

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that those attorneys who accept appointments do not suffer economic hardship.

H.R. 3004 is an updated version of a similar bill, H.R. 4307, which was reported favorably and unanimously by this Committee during the 98th Congress, and which was approved by voice vote by the House of Representatives on May 21, 1984 under Suspension of the Rules.[1] Although the Senate did not process H.R. 4307, a modest amendment to the CJA was made in the Comprehensive Crime Control Act of 1984 (Chapter XIX, Public Law 98-433, 98 STAT. 2185-6). The 1984 amendment as enacted into law raised the CJA hourly rates—which had not been amended since 1970—from $20 (out-of-court) and $30 (in-court) to $40 (out-of-court) and $60 (in-court). In addition, it increased the general case maximums from $1,000 to $2,000 for a felony, from $400 to $800 for a misdemeanor, from $1,000 to $2,000 for an appeal, and from $250 to $500 for a post-trial motion, a probation revocation hearing, and other related proceedings. While the 1984 amendment was a step in the right direction, it did not provide sufficient relief on the compensation issue, nor did it address a number of other issues raised by the Judicial Conference, and addressed by H.R. 4307 in the 98th Congress.

H.R. 3004 revises the compensation levels which may be paid to attorneys, and makes other improvements in the administration of the Criminal Justice Act. Such legislation is supported by the Judicial Conference, the American Bar Association, the National Association of Former U.S. Attorneys, the Federal Public and Community Defenders, the National Legal Aid and Defender Association, the National Association of Criminal Defense Lawyers, Inc., numerous State and local bar associations and individuals. Among the State and local bar associations which have indicated support for updating the CJA are: the Alaska Bar Association, the State Bar of Arizona; California Attorneys for Criminal Justice, the State Bar of California (Criminal Law Section and Federal Courts Committee), the Los Angeles County Bar Association, the Bar Association of San Francisco, the District of Columbia Bar, the Hispanic Bar Association of D.C., the Idaho State Bar, the State Bar of Montana (Judicial Committee), the New York State Defenders Association, the Northern Marianas Bar Association, the Oregon State Bar (Defense of the Indigent Accused Committee), the Philadelphia (PA) Bar Association, the State Bar of Wisconsin, and the Dane County (WI) Criminal Defense Lawyers Association. Much of this support was indicated during the 98th Congress, when the Committee was reviewing H.R. 4307 and the original Judicial Conference proposal H.R. 3233. Hearings have been held by the Committee during the 98th [2] and 99th [3] Congresses. Among the witnesses have been representatives of the Judicial Conference,[4] of the General Accounting

[1] See H. Rept. 98-764, filed May 15, 1984.

[2] Hearings before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, June 30, and July 14, 1983.

[3] Hearing before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, July 15, 1985.

[4] In addition, during the 98th Congress, the Seventh Circuit stated in an opinion its concern that the Congress "give a high priorty to amending the Criminal Justice Act to provide realistic compensation for appointed attorneys." Mills v. U.S., 713 F.2d 1249, at 1258 (7th Cir. 1983), affirming 547 F. Supp. 116 (N.D. Ill. 1982); cert. denied, 464 U.S. 1069 (1984).

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Office, of the Federal Defenders, of the National Legal Aid and Defender Association, and of the National Association of Former U.S. Attorneys. There is no known opposition to the legislation. H.R* 3004 responds to the documented need to further update the CJA.

BACKGROUND

The Criminal Justice Act was enacted in 1964 (Public Law 88-455, § 2, Aug. 20, 1964, 78 Stat. 552) to insure that a system of representation was available for defendants in Federal criminal cases who were financially unable to obtain counsel. At the time of enactment, maximum hourly rates for an appointed attorney were set at $10 for out-of-court work and $15 for in-court work. Maximums per case were set at $500 for a felony and $300 for a misdemeanor.

In 1970, the CJA was amended (Public Law 91-447, § 1 Oct. 14, 1970, 84 Stat. 916) to increase the hourly rates to $20 for out-of-court work and $30 for in-court work. Case maximums were raised to $1,000 for a felony and $400 for a misdemeanor, although a waiver of maximums could be sought for "extended or complex representation." The CJA was expanded to include representation of defendants charged with violation of probation, certain defendants charged with juvenile delinquency, any person under arrest when such representation is required by law, and at the discretion of the court any person who is subject to revocation of parole, in custody as a material witness, or seeking collateral relief under sections 2241, 2254, or 2255 of title 28 United States Code or section 4245 of title 18 United States Code, or certain ancillary matters. A maximum of $1,000 was set for each case on appeal and a $250 maximum for post-trial motions, probation revocation proceedings, and the discretionary matters mentioned previously.

During the 97th Congress, the Judicial Conference, acting on a resolution adopted in September of 1980, requested that legislation be introduced to update the Criminal Justice Act.[5] A legislative proposal which was the culmination of efforts by the Judicial Conference, its Committee to Implement the Criminal Justice Act, the Criminal Justice Act Division of the Administrative Office of the U.S. Courts, and the Federal Defender Advisory Committee, was submitted. The two major problems which the Conference's Committee had noted were (1) the difficulties encountered by courts in obtaining attorneys willing to accept CJA appointments, and (2) an additional administrative burden imposed upon the Chief Judges of the Circuits by the substantial increases in claims by attorneys for compensation in excess of the maximum limit under the CJA. The resolution adopted by the Conference indicated its concern about the inadequacy of existing rates of compensation and maximum limits, its adverse effect, and a recommendation that Congress address the issues as soon as possible.

In response to the communication, H.R. 5190 was introduced by Representative Robert W. Kastenmeier during the 97th Congress and referred to this Committee. However, due to the press of other business, no action was taken. In the 98th Congress, the Judicial

[5] Letter dated April 21, 1981, from Hon. William E. Foley, then Director of the Administrative Office of the U.S. Courts, to Hon. Thomas P. O'Neill, Jr., Speaker of the House, with attached legislative proposal.

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Conference again requested new legislation.[6] An excerpt from the letter follows:

> There is increasing concern at all levels of the Federal Judiciary that further delay in implementing the proposed amendments will seriously threaten the availability of experienced and qualified counsel willing to accept appointment under the Act and may significantly erode the quality of legal services which the Sixth Amendment to the Constitution mandates.
>
> The General Accounting Office, in its recent report on the admijistration of the Criminal Justice Act (GAO/GGD-83-18), stated the "real value [of the fees currently paid to court appointed attorneys under the CJA] has obviously decreased substantially because of inflation. On this basis alone they deserve examination".

In response to this communication, H.R. 3233 was introduced by Representatives Robert W. Kastenmeier and Mike Lowery. Two days of hearings (June 30 and July 14, 1983) were held on the proposal before the Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice. All witnesses at the hearings urged the Subcommittee to update the Act so that defendants and certain other persons qualifying for the appointment of counsel could be assured of adequate representation, and so that qualified attorneys would continue to provide services.

On September 15 and October 20, 1983, the Subcommittee on Courts, Civil Liberties and the Administration of Justice marked up H.R. 3233, and unanimously recommended that a clean bill be referred to the full Committee. That bill, H.R. 4307, was introduced on November 3, 1983, and was cosponsored by all the members of the Subcommittee. H.R. 4307 was more fiscally conservative than H.R. 3233, the original Judicial Conference proposal. In addition, it reflected certain changes suggested by the Department of Justice. The legislation was approved by the Committee on May 1, 1984, without objection, and a report was filed on May 15, 1984 (H. Rept. 98-764). The bill was considered under Suspension of the Rules and passed by voice vote on May 21, 1984. Although the Senate Judiciary Subcommittee on the Constitution held a hearing (September 11, 1984) on H.R. 4307 and a companion bill, S. 2402, no further action was taken. However, a modest amendment to the CJA was enacted in the Comprehensive Crime Control Act of 1984 (CCCA) (discussed above).

During this Congress, the Judicial Conference submitted a further request that legislation be enacted similar to H.R. 4307 (98th Congress), and with an additional provision relating to the certification for payment of defense fact witness fees. H.R. 3004 was introduced on July 16, 1985, by Chairman Robert W. Kastenmeier and Ranking Minority Member Carlos J. Moorhead of the Subcommittee on Courts, Civil Liberties and the Administration of Justice. (A similar bill, S. 1581, was introduced on August 1, 1985, by Sena-

[6] Letter dated Apr. 7, 1983, from Hon. William E. Foley, then Director of the Administrative Office of the U.S. Courts, to Hon. Thomas P. O'Neill, Jr., Speaker of the House, with attached legislative proposal.

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tors Thurmond and Mathias.) A hearing was held on July 25, 1985, and the legislation was ordered reported favorably to the full Committee with a minor amendment on October 1, 1985. The full Committee ordered that H.R. 3004 be reported favorably on November 19, 1985, including the Subcommittee's amendment changing the word "competency" to "condition" in section 2 to conform to the CCCA, and delaying the effective date to October 1, 1986, or later.

H.R. 3004 updates the CJA in the following manner. H.R. 3004 sets a general maximum rate of $50 per hour. The Judicial Conference would be authorized to approve higher rates up to a maximum of $75 per hour. No distinction is made between in-court and out-of-court time. These figures were reached by reviewing surveys of circuits conducted by the Administrative Office of the U.S. Courts and by considering the geographic cost-of-living differentials and increases since 1970. From January 1971 until May 1985, the increase in the cost of living, according to the Bureau of Labor Statistics, was 170%. The Judicial Conference in consultation with the judicial councils of the circuits may vary the rates by district considering factors such as the minimum range of prevailing rates for qualified attorneys in the district. Three years after the effective date of the Act (October 1, 1986 or later), the hourly rates may be raised consistent with cost-of-living raises granted to Federal employees, but only if the Judicial Conference decides it is appropriate. A cost-of-living increase is not mandatory after three years, but is left to the discretion of the Judicial Conference. H.R. 3004 raises the maximum payment per case to $5,000 for a felony, $1,500 for a misdemeanor, $3,000 for an appeal, $1,000 for other proceedings, and raises support services (e.g., investigative and expert services) to $1,000 with permission or nunc pro tunc authorization under certain circumstances, or $300 without advance permission. Case maximums for attorney compensation and expert or other services may be waived if the court issues the appropriate certification and payment is approved by the chief judge of the circuit.

H.R. 3004 also makes other improvements recommended by the Judicial Conference including allowing the option of malpractice insurance for Federal defenders or providing representation and holding them harmless, appointment of counsel in certain petty offenses, mandating appointment of counsel for financially eligible material witnesses in custody, and the continuing education and training of panel attorneys. It also removes a restriction placed in the Act in 1970 which precludes the U.S. District Court for the District of Columbia from establishing a Federal Defender Organization. The Chief Judges of the U.S. District Court (D.C.) and of the Court of Appeals (D.C. Circuit) have supported the repeal of this restriction. Thus, the D.C. Circuit will, as all other circuits, have the option of creating a mixed private bar/public defender system. H.R. 3004 amends section 1825 of title 28, United States Code, to authorize Federal public defenders and their assistants appointed under the CJA to certify the payment of defense fact witness in Federal criminal cases. In those cases where representation is furnished by other counsel appointed under the CJA—private panel attorneys or attorneys furnished by a Community Defender Organization—defense fact witnesses would be certified by the clerk of the district court upon the affadavit of the witnesses' attendance by

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the appointed attorney. In each case, the appearance of defense witnesses would be pursuant to a subpoena issued upon approval of the court. This amendment to section 1825 of title 28, United States Code, has had the support of the Department of Justice. Currently U.S. Attorneys and their assistants perform this function, and this role is burdensome to them and may create a conflict of interest.

The major changes between current law and H.R. 3004 are contained in Appendices 1 and 2, which also compare the major changes contained in H.R. 3004 with H.R. 3233, the original Judicial Conference proposal in the 98th Congress, and the 1984 changes made by the CCCA. H.R. 3233 contained several provisions which would have codified established administrative practices under the present Act. The omission of these provisions in H.R. 3004 does not constitute disapproval of the practices as the existing legal basis for them has not been changed. (See, "Guidelines for the Administration of the Criminal Justice Act," Volume VII, "Guide to Judiciary Policies and Procedures.")

Oversight Findings

The Committee makes the following oversight findings with respect to this legislation. The Committee finds that the current system of compensation under the CJA is generally inadequate and should be revised as contained in this bill.

In regard to clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, no oversight findings have been submitted to the Committee by the Committee on Government Operations.

Statement of the Committee on Government Operations

No statement has been received on the legislation from the House Committee on Government Operations.

New Budget Authority

In regard to clause 2(l)(3)(B) of rule XI of the Rules of the House of Representative, H.R. 3004 creates no new budget authority or increased tax expenditures for the Federal Government.

Inflationary Impact Statement

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee finds that the bill will have no foreseeable inflationary impact on prices or costs in the operation of the national economy.

Federal Advisory Committee Act of 1972

The Committee finds that this legislation does not create any new advisory committees within the Federal Advisory Committee Act of 1972.

Committee Vote

On November 19, 1985, H.R. 3004 was ordered reported favorably, as amended, by the Committee on the Judiciary by voice vote, no objection being heard, and with 32 members being present.

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COST ESTIMATE

In regard to clause 7 of the rule XIII of the Rules of the House of Representatives, the Committee agrees with the cost estimate of the Congressicnal Budget Office.

STATEMENT OF THE CONGRESSIONAL BUDGET OFFICE

Pursuant to clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, and section 403 of the Congressional Budget Act of 1974, the following is the cost estimate in H.R. 3004 prepared by the Congressional Budget Office.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, December 3, 1985.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the attached cost estimate for H.R. 3004, the Criminal Justice Act Revision of 1985.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

RUDOLPH G. PENNER.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: H.R. 3004.
2. Bill title: Criminal Justice Act Revision of 1985.
3. Bill status: As ordered reported by the House Committee on the Judiciary, November 19, 1985.
4. Bill purpose: H.R. 3004 more precisely defines circumstances under which a person who cannot afford adequate representation shall have representation furnished for him in federal courts. The bill changes maximum hourly rates for attorneys providing such representation and authorizes the Judicial Conference to raise this maximum annually, beginning three years after the bill's effective date. The bill also authorizes the Administrative Office of the U.S. Courts (AOUSC) to purchase liability insurance, or provide representation and pay any judgment, for employees of a federal public defender or community defender organization. In addition, the bill authorizes the AOUSC to provide continuing education for attorneys providing representation under this act. The effective date of the bill is October 1, 1986.
5. Estimated cost to the Federal Government:

[By fiscal years, in millions of dollars]

	1986	1987	1988	1989	1990
Estimated authorization level		9.5	9.5	9.5	11.4
Estimated outlays		9.0	9.5	9.5	11.3

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The costs of this bill fall within budget function 750.

Basis of estimate: Under current law court-appointed attorneys are authorized up to $40 per hour for work done out of court and $60 per hour for in-court work time. This bill authorizes payment of a flat $50 per hour to such attorneys, with an allowance for an increase to $75 per hour in certain high-cost districts. CBO has estimated the potential budget impact of the change in payment limit, based on information from the Criminal Justice Act Division of the Administrative Office of the U.S. Courts. The estimate assumes that the workload for court-appointed attorneys will continue at its current rate, and that the judicial districts that have indicated to the Administrative Office that they would seek to raise the maximum hourly compensation rate to $75 would be allowed to do so. It further assumes that the Administrative Office would raise the rate by 20.5 percent in fiscal year 1990 based on the federal pay-raise increases assumed for fiscal year 1987 and 1988 in the First Concurrent Resolution on the Budget—Fiscal Year 1986, and CBO projections for fiscal years 1989 and 1990. For the purpose of this estimate, it is assumed that the AOUSC would purchase liability insurance, rather than pay judgments on behalf of employees of a federal public defender or community defender organization. The liability insurance and attorney training provisions in the bill are expected to cost a total of about $300,000 per year.

6. Estimated cost to State and local governments: None.

7. Estimate comparison: None.

8. Previous CBO estimate: None.

9. Estimate prepared by: Debra Goldberg.

10. Estimate approved by: C.G. Nuckols (for James L. Blum, Assistant Director for Budget Analysis).

Section-by-Section Analysis

Section 1 provides that the Act may be cited as "the Criminal Justice Act Revision of 1985".

Section 2 amends 18 U.S.C. 3006A in the following manner:

(a) Adequate representation of defendants

Subsection (a) has been restructured for purposes of clarity and to incorporate changes in the law since the last comprehensive revision of the Criminal Justice Act (hereinafter referred to as "CJA") in 1970. Mandatory appointments are listed in paragraph (a)(1) and discretionary appointments (previously found in subsection (g)) are now located directly below in paragraph (a)(2).

Paragraph (a)(1) has been amended to provide separately for mandatory representation of those charged with juvenile delinquency, a probation violation, or a felony or misdemeanor. Thus, subparagraph (a)(1)(A) provides for mandatory representation when a felony or misdemeanor is charged, subparagraph (a)(1)(B) provides for the mandatory representation of those charged with juvenile delinquency, and subparagraph (a)(1)(C) provides for mandatory representation of those alleged to have violated probation. The language of subparagraph (a)(1)(B) has also been changed slightly to conform with the provisions of chapter 403 of title 18, United States Code, entitled "Juvenile Delinquency."

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Subparagraph (a)(1)(E) conforms the language of the CJA to that of the Parole Commission and Reorganization Act of 1976. The new language makes it clear that appointment of counsel under the CJA is mandatory in parole matters when so provided in the Parole Commission and Reorganization Act. (See comments below relating to Section 3 of the bill which further amends the CJA to eliminate references to parole in accordance with the Comprehensive Crime Control Act of 1984 (CCCA), title II, P.L. 98-473, 98 Stat. 1837, October 12, 1984).

Subparagraph (a)(1)(G) makes appointment of counsel mandatory for a material witness who is in custody, and not discretionary as currently provided in subsection (g). The Bail Reform Act of 1984, enacted as chapter I of the CCCA, provided for mandatory representation by appointed counsel at a detention hearing for a financially eligible person arrested as a material witness (See Sections 3144 and 3142(f) of title 18, United States Code). This requirement is incorporated into the CJA through the operation of current paragraph (a)(2) of the CJA which provides for the furnishing of representation to a person "who is under arrest when such representation is required by law," as well as current paragraph (a)(5) which provides for the representation of a person "for whom, in a case in which he faces loss of liberty, any Federal law requires the appointment of counsel." However, subsection (g) continues to provide discretionary authority for the appointment of counsel to represent a material witness in custody and, presumably, encompasses representation at every stage of such proceedings including the giving of a deposition by the material witness. Since the mandatory appointment provision of the Bail Reform Act of 1984 onhy refers to representation at the detention hearing, it is unclear whether the appkintment of counsel to assist materiah witnesses ij custody at depositikns remaijs within the discretioj of the presiding judge or magistrate. Amending the CJA to require the appointment of counsel for material witnesses will (1) eliminate any questions concerning the entitlement to representation throughout the material witness proceedings, (2) be consistent with what already is the general practice in a number of districts, and (3) reflect the view of the Judicial Conference that any person held in custody against his or her will, whether as a defendant or one designated by a party as material witness, should have the assistance of an attorney in exercising all rights provided by law.

Subparagraphs (a)(1)(H) and (a)(1)(I) make no substantive change, but merely separate into two subparagraphs the provision appearing in current paragraph (a)(5).

Paragraph (a)(2) replaces current subsection (g) and lists those cases in which appointment of counsel is discretionary.

Subparagraph (a)(2)(A) is new and permits the appointment of counsel, as a matter of discretion, in petty offense cases where a sentence of confinement is authorized. At present, the language of the CJA excludes appointment of counsel in petty offense cases. However, as a result of two Supreme Court decisions, there are some petty offense cases and situations in which appointment of counsel is now required. In the first decision, *Argersinger* v. *Hamlin*, 407 U.S. 24 (1972), the Court held that under the Sixth Amendment to the Constitution an indigent defendant is entitled

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to appointment of counsel if there is a likelihood of imprisonment. The Court expressly reserved the question of the right to counsel in cases where incarceration is authorized but will not be imposed. Later, in *Scott* v. *Illinois*, 440 U.S. 367 (1979), the Supreme Court held that there is no constitutional right to appointed counsel unless imprisonment is actually imposed. In view of the *Argersinger* and *Scott* decisions, attorneys are presently being appointed in petty offense cases where there is a likelihood of imprisonment, and compensation is being provided under the authority of paragraph (a)(5) of the Criminal Justice Act, which extends the coverage of the Act to all cases where the Sixth Amendment to the Constitution requires the appointment of counsel.

There remains a practical difficulty however, since a judge or magistrate must predict at the commencement of proceedings whether or not a term of confinement is likely to be imposed. Generally, comparatively little information concerning the facts of the case, aggravating or mitigating circumstances, or the character of the defendant is available to the judicial officer at that time. A decision not to appoint counsel at the preliminary stages of proceedings serves to foreclose incarceration as a sentencing option of the court. Subparagraph (a)(2)(A) would eliminate this problem by permitting judges and magistrates to appoint counsel in petty offense cases where incarceration is authorized by statute and they determine that the interests of justice require it. The final decision concerning imposition of a term of confinement could then be reserved until the conclusion of the proceedings. Accordingly, maximum sentencing flexibility would be preserved. (See comments below relating to Section 3 of the bill which further amends the CJA to reflect the new offense classifications created by the CCCA*)

The language of paragraph (a)(3) contains no substantive changes (although it now comprises a separate subparagraph, with stylistic improvements.

(b) Appointment of counsel

The second sentence is made less cumbersome by the omission of individual references to the category of cases for which a person may be entitled to appointed counsel. The word "person" has been substituted for the word "defendant" in this subsection, and elsewhere in the CJA, to reflect the fact that counsel may be appointed for habeas petitioners and material witnesses as well as for persons charged with a crime.

(d) Payment for representation

(d)(1) Hourly rate

(d)(2) Maximum amounts

The CJA, as enacted in 1964, provided for compensation of appointed counsel at a rate not to exceed $15 per hour for time expended in court, and $10 per hour for time expended out of court. The CJA also provided maximum compensation limits of $500 for felony cases and $300 for misdemeanor cases. The 1970 amendments increased the hourly rate maximums to $30 per hour for time expended in court, and $20 per hour for time expended out of

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court. Maximum compensation limits were increased to $1,000 for felony cases, and $400 for misdemeanor cases. In addition, new maximums were established—$1,000 for representation provided on appeal, and $250 for appointment under subsection (g), probation revocation cases, and post-trial motions made after entry of judgment.

The rates and maximums remained at the levels set in 1970 for nearly fourteen years, until the passage of the CJA Revision of 1984 which was enacted as chapter XIX of the CCCA. The CJA Revision of 1984 doubled the hourly rates of attorney compensation by raising the limits to their current levels of $60 per hour for in-court time, and $40 per hour for out-of-court time. In addition, the CJA Revision of 1984 doubled the case compensation maximums.

These compensation increases will provide the courts with, at least, partial relief from the difficulties they have been encountering in recent years in recruiting and retaining qualified private attorneys to serve on their CJA panels. There are, however, serious concerns that (1) in at least some high-cost districts, the new compensation levels continue to be inadequate, and (2) in those districts where the present compensation limits are sufficient, changes in economic conditions in the ensuing years will erode the values of these limits and render them inadequate long before Congress legislates additional increases.

Congressional action to increase compensation followed, by seven years, the determination by the Judicial Conference Committee to Implement the CJA that the rate and case compensation maximums had become inadequate and its recommendation that they be increased. It was this delay factor that led to the compensation scheme embodied in H.R. 4307, the Judicial Conference supported CJA revision bill which was introduced in the 98th Congress and passed the House of Representatives, but not the Senate.

The compensation scheme of H.R. 4307 is retained in H.R. 3004. It amends paragraph (d)(1) of the CJA to establish a maximum hourly compensation rate of $50, thus eliminating the in-court and out-of-court hourly rate differential and the administrative burdens and expenses associated with it. While the $50 rate represents a decrease from the $60 rate currently applicable to in-court hours, the change is expected to result in a moderate increase in the total amount of compensation available in most cases, since approximately 75% of all hours expended by CJA counsel are for services performed out of court and thus are subject to the $40 per hour limit. On the other hand, the elimination of the need to administer two rates should produce savings.

In addition, the Judicial Conference would be authorized to set a higher maximum hourly rate not to exceed $75, for a particular circuit or district within a circuit, if the Conference determines that circumstances existing in such circuit or district warrant an exception from the general maximum. Further, the Judicial Conference would be authorized to develop guidelines for determining such maximum hourly rates, taking into account such factors as (1) the minimum range of the prevailing rate for qualified attorneys in individual districts, and (2) the recommendation of the judicial councils of the circuits.

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The provision for setting an alternate hourly rate would restore at least some of the flexibility and viability which the Congress created when, in 1970, it amended paragraph (d)(1) of the CJA to authorize judicial councils to set alternate hourly rates for districts, "not to exceed the minimum hourly scale established by a bar association for similar services rendered in the district." This goal was subsequently frustrated by the abolishment of minimum bar fee schedules following the decision of the Supreme Court in *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975), which held that a minimum fee schedule promulgated and enforced by a bar association constitutes unlawful price-fixing in violation of the Sherman Act. The *Goldfarb* decision thus resulted in a collateral deactivation of the adjustment authority conferred by Congress in the Circuit Councils. In *Mills* v. *United States,* 713 F. 2d 1249, (7th Cir. 1983), *cert. denied,* 464 U.S. 1069 (1984), the Court of Appeals for the Seventh Circuit held that, in the absence of a local bar association minimum fee schedule, the Judicial Council for the Seventh Circuit lacked authority to increase the hourly rates payable to attorneys accepting appointments under the CJA above the $20 and $30 maximums. While the CJA Revision of 1984 removed the 1970 language authorizing judicial councils to set alternate hourly rates, it made no provision to replace this mechanism for affording flexibility to the CJA compensation scheme.

In addition H.R. 3004 would authorize, but not require, the Judicial Conference to annually increase the $50 and $75 maximums up to the Federal pay comparability raises, if any, given to Federal employees. Thus, the CJA would include a limited mechanism for administrative adjustment of the compensation rates to provide for fair and reasonable compensation to counsel in light of future changes in economic conditions. This authority would not become operative until three years after the effective date of the proposed legislation.

Finally, in view of the increase in hourly rates, proposed paragraph (d)(2) would increase the overall per-case compensation maximums to $5,000 for felonies, $1,500 for misdemeanors, $3,000 for appeals and $1,000 for any other representation provided under the CJA. Cases falling within subsection (g) of the current law would be included in the new "other representation" category. Also included would be cases brought within the scope of the CJA under subparagraph (a)(1)(I) (current paragraph (a)(5)), as a result of judicial decisions or new Federal statutes which may require the appointment of counsel. The need for this provision was most recently demonstrated by the enactment of the Insanity Defense Reform Act of 1984 (Chapter IV of the CCCA) which amended the CJA to provide for representation at certain mental competency proceedings but failed to include a case compensation maximum for such appointments.

(D)(3) Waiving maximum amounts

While amendments to paragraph (d)(2) made by H.R. 3004 allow for some variation among the districts with respect to the maximum hourly rate, and also contain a limited mechanism to permit raises to the hourly maximum to reflect increases in the cost of living, the case compensation maximums established by the new

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paragraph (d)(2) are limits to be applied in every district and circuit and may not be increased by the Judicial Conference. Thus, attorneys in districts where a higher hourly rate has been established under paragraph (d)(2) may reach the case compensation limit after expending fewer hours than attorneys in districts where the lower hourly rate is in effect. In order to avoid an erosion of the flexibility intended in the compensation scheme set forth in paragraph (d)(2), the standard for waiving the maximum amount has been broadened—the judicial officers' authority to certify compensation in excess of the maximum would no longer be limited to those cases which are "extended and complex". Under the new standard, the maximum could be waived by the chief judge of the court of appeals upon the certification of the presiding judicial officer that excess payment is necessary to provide "fair compensation".

The case compensation ceilings would also be effectively lowered if the Judicial Conference approved higher hourly rates based upon Federal pay comparability increases. The proposed waiver standard will permit the full realization of the benefits of such adjustments.

(d)(4) Filing claims

The word "person" has been substituted for "defendant".

(e) Services other than counsel

(e)(1) Upon request

The phrase "adequate representation" has been inserted in lieu of "an adequate defense".

(e)(2) Without prior request

The modest increase from $150 to $300 as the amount which may be incurred for expert services without prior authorization takes into account the dramatic increase in the cost of these services which has occurred since this limit was established in 1970. In addition, paragraph (e)(2) has been split into subparagraphs (A) and (B). Subparagraph (A) is substantially identical to current paragraph (e)(2), the exception being the substitution of "representation" for "defense", the increased dollar limitation, and the reference to subparagraph (B). Subparagraph (B) is a new provision which allows the judge or magistrate to approve a claim for investigative, expert, or other services obtained by appointed counsel, even though prior authorization has not been secured and the amount of the claim exceeds the new limit established by subparagraph (A). However, subparagraph (B) would limit the discretion of judicial officers to provided this ratification to those circumstances where "timely procurement of the necessary services could not await prior authorization."

(e)(3) Maximum amounts

The $300 limit contained in the present Act has not been changed since the CJA was enacted in 1964. The proposed bil raises the limit to $1,000, a more realistic figure in view of the increase in fees charged by investigators and experts during the nearly twenty-one years since the current limit was established.

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(g) Discretionary appointments (deleted); redesignations

Current subsection (g) has been deleted and is found in new paragraph (a)(2), and current subsections (h) through (l) have been redesignated as subsections (g) through (k), respectively.

(g) Defender organization (currently subsection (h))

(g)(2) Types of defender organization

This paragraph contains two minor stylistic revisions.

(g)(3) Malpractice and negligence suits (new)

This paragraph is intended to provide protection for employees of Federal public and community defender organizations who face lawsuits alleging legal malpractice and negligence arising out of their performance of representational services within the scope of their employment. Since the Supreme Court's decision in *Ferri* v. *Ackerman*, 444 U.S. 193 (1979), there has been serious concern about the impact on the Federal defender program of the potential exposure of employees of Federal defender organizations to personal liability for legal malpractice and negligence claims. Paragraph (g)(3) would give the Director of the Administrative Office of the United States Courts explicit statutory authority to either furnish representation and hold harmless, or provide liability insurance for employees of Federal public and community defender organizations. The language of this provision is similar to current statutory authorities for insulating personnel against personal liability for medical malpractice. See 10 U.S.C. Sec. 1089; 38 U.S.C. Sec. 4116; and 42 U.S.C. Sec. 233.

(i) Appropriations (currently subsection (j))

At the present, the training and education of Federal public defenders is provided through the Federal Judicial Center as part of its general training program for all members and employees of the Federal Judiciary. The amendment to this subsection is intended to specifically designate funds through the defender budgetary process for the continuing education and training of Federal defenders and their staffs as well as for private counsel on the CJA panels. It will permit separate, flexible, and long-term planning for defender training which is more comparable to that provided United States attorneys. This amendment will further enhance cooperation between Federal defenders and the private bar and facilitate their continuing efforts to improve the quality of representation in the Federal courts. At present, Federal Judicial Center training programs for Federal defenders are generally not open to CJA panel attorneys and there is no other federally sponsored program for training panel attorneys. This amendment would not preclude an inter-agency agreement with the Federal Judicial Center to take advantage of efficiencies and economies in the administration of these educational programs.

The training of CJA panel attorneys as well as Federal defenders is of paramount importance in light of the need for the improvement of advocacy in the Federal courts recognized in the report of the Committee of the Judicial Conference of the United States to Consider Standards for Admission to Practice in the Federal

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Courts. It is believed that making training funds available in this manner will provide the needed flexibility in the area of training and continuing education to increase the overall effectiveness of Federal defenders and CJA lawyers.

(j) Districts included (currently subsection (k))

This subsection has been amended to expressly provide that the District Court for the Northern Mariana Islands is a district court within the meaning of the CJA. A parallel provision currently appears in 48 U.S.C. 1694c(b), thus the change is merely a conforming revision. In addition, the subsection has been reworded for purposes of style.

(k) Applicability in the District of Columbia (currently subsection (l))

This subsection would give the United States District Court for the District of Columbia the option of establishing a Federal defender organization.

Section 3 provides conforming amendments which will be required when the major part of the Sentencing Reform Act of 1984 (chapter II, Comprehensive Crime Control Act of 1984) becomes effective on November 1, 1986. These include technical amendments to reflect changes in offense classifications as well as the elimination of parole.

Section 4 amends 28 U.S.C. Section 1825 to authorize Federal public defenders and other counsel appointed under the CJA to certify the payment of defense fact witness fees in Federal criminal cases. The current language of this section provides that in any case in which the United States is a party (which includes all Federal criminal cases) the United States attorney, or an assistant United States attorney, must certify the claims of witnesses for the payment of fees. This requirement applies to witnesses whether they are appearing on behalf of the government, or on behalf of a defendant or petitioner for whom CJA services are authorized.

The practice of having prosecutors certify the payment of defense witness fees poses the potential for conflicts of interest for the U.S. attorneys, as well as additional administrative burdens.

The amendment to the witness fee certification statute will authorize Federal public defenders and their assistants to certify the payment of defense fact witness fees in those cases where representation is provided by Federal public defenders or their assistants. In those cases where representation is furnished by other counsel appointed under the CJA—private panel attorneys or attorneys furnished by a community defender organization—defense fact witness fees would be certified by the court upon the affidavit of the witnesses' attendance by the appointed attorney. In each case, the appearance of the defense witness would be pursuant to a subpoena issued upon approval of the court.

The proposed revision of the procedures for certifying defense fact witness fees has had the support of the Department of Justice in the past two Administrations.

Section 5 provides that the Act and amendments made by sections 2, 3, and 4 of the Act shall take effect on October 1, 1986, or 120 days after enactment, whichever is later.

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APPENDIX 1

COMPARISON OF H.R. 3004 WITH CJA REVISION OF 1984 (CHAPTER XIX OF THE COMPREHENSIVE CRIME CONTROL ACT OF 1984)

Issue	CJA revision of 1984	H.R. 3004
1. Hourly rates	Raised maximum attorney compensation for in-court time to $60 per hour; out-of-court time to $40 per hour.	Would set maximum attorney compensation at $50 per hour for in-court and out-of-court time.
2. Hourly rate variations among districts or circuits	Did not address	Would permit Judicial Conference to raise maximum attorney compensation to $75 per hour for individual districts or circuits.
3. Subsequent adjustments of hourly rates.	Did not address	Three years after the effective date of the Act, the Judicial Conference would be permitted to raise maximum hourly rate for attorneys up to the cost of living increases for Federal employees.
4. Case compensation maximums	Felony—$2,000; misdemeanor—$800; appeals—$2,000; post-trial motion, probation, subsection (g)—$500.	Felony—$5,000; misdemeanor—$1,500; appeals—$3,000; other cases for which act requires or authorizes appointment of counsel—$1,000.
5. Waiver of maximum amounts	Did not address	Would eliminate requirement that a case must be extended or complex in order for excess compensation to be authorized.
6. Material witness representation	Did not address	Would make appointment of counsel for a material witness in custody mandatory, rather than discretionary, as is provided under subsection (g).
7. Petty offenses where confinement is authorized.	Did not address	Would permit appointment of counsel in petty offense cases where sentence to confinement is authorized and representation is required in the interests of justice.
8. Investigative, expert and other services.	Did not address	Would raise limit for obtaining services without prior authorization to $300. Would raise limit for obtaining services with prior authorization to $1,000. Would permit nunc pro tunc authorization.
9. Malpractice protection for Federal defenders.	Did not address	Would authorize the Director of the Administrative Office to provide professional liability insurance for defenders or provide representation and hold harmless.
10. Training	Did not address	Would authorize funds for continuing education and training of persons providing representational services.
11. Defender organization for the District Court for the District of Columbia.	Did not address	Would remove restriction on District of Columbia Circuit and District of Columbia District Court, thereby allowing the District to establish a Federal defender organization.
12. Certification of witness fees	Did not address	Would amend 28 U.S.C. § 1825 to relieve U.S. attorneys and assistants of the responsibility of certifying payment of defense fact witness fees in Federal criminal cases.

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APPENDIX 2

CJA CASE COMPENSATION MAXIMUMS

Type case	Rates (1970-1984)	Present rates (CJA Revision of 1984)[1]	Original Judicial Conference proposal 98th Cong. (H.R. 3233)	(H.R. 3004 99th Cong.) (H.R. 4307 98th Cong.)
Felony	$1,000	$2,000	$10,000	$5,000
Misdemeanor	400	800	3,000	1,500
Appeal	1,000	2,000	6,000	3,000
Post-trial motion; probation revocation; subsection (g)	250	500	[2]2,500	[2]1,000
Expert services without prior authorization	150	150	300	300
With prior authorization	300	300	1,000	1,000

[1] Chapter XIX, of the Comprehensive Crime Control Act of 1984.

[2] In addition to increasing the case compensation levels for felonies, misdemeanors, and appeals, the original Judicial Conference proposal (H.R. 3233, 98th Cong.), H.R. 4307 (98th Cong.) and H.R. 3004 (99th Cong.) would establish a new case compensation category for "any other representation required or authorized" by the CJA. Post-trial motions, probation revocation and subsection (g) representation would be included in this category, as would cases brought within the scope of the CJA under paragraph (a)(5) of the Act, as a result of judicial decisions or new Federal statutes which may require the appointment of counsel. The need for such a provision was most recently demonstrated by the enactment of the Insanity Defense Reform Act of 1984 (Chapter IV of the Comprehensive Crime Control Act of 1984) which amended the CJA to provide for representation at certain mental condition proceedings but failed to include a case compensation maximum for such appointments.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in *italics*, existing law in which no change is proposed is shown in roman):

SECTION 3006A OF TITLE 18, UNITED STATES CODE

§ 3006A. Adequate representation of defendants

(a) Choice of plan

Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation [(1) who is charged with a felony or misdemeanor (other than a petty offense as defined in section 1 of this title) or with juvenile delinquency by the commission of an act which, if committed by an adult, would be such a felony or misdemeanor or with a violation of probation, (2) who is under arrest, when such representation is required by law, (3) who is subject to revocation of parole, in custody as a material witness, or seeking collateral relief, as provided in subsection (g), (4) whose mental condition is the subject of a hearing pursuant to chapter 313 of this title, or (5) for whom the Sixth Amendment to the Constitution requires the appointment of counsel or for whom, in a case in which he faces loss of liberty, any Federal law requires the appointment of counsel. Representation under each plan shall include counsel and investigative, expert, and other services necessary for an adequate defense. Each plan shall include a provision for private attorneys. The plan may include, in addition to a provi-

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sion for private attorneys in a substantial proportion of cases, either of the following or both:

[(1) attorneys furnished by a bar association or a legal aid agency; or

[(2) attorneys furnished by a defender organization established in accordance with the provisions of subsection (h).] *in accordance with this section. Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate representation. Each plan shall provide the following:*

(1) Representation shall be provided for any financially eligible person who—

(A) is charged with a felony or a misdemeanor (other than a petty offense as defined in section 1 of this title);

(B) is a juvenile alleged to have committed an act of juvenile delinquency as defined in section 5031 of this title;

(C) is charged with a violation of probation;

(D) is under arrest, when such representation is required by law;

(E) is entitled to appointment of counsel in parole proceedings under chapter 311 of this title;

(F) is subject to a mental condition hearing under chapter 313 of this title;

(G) is in custody as a material witness;

(H) is entitled to appointment of counsel under the sixth amendment to the Constitution; or

(I) faces loss of liberty in a case, and Federal law requires the appointment of counsel.

(2) Whenever the United States magistrate or the court determines that the interests of justice so require, representation may be provided for any financially eligible person who—

(A) is charged with a petty offense for which a sentence to confinement is authorized; or

(B) is seeking relief under section 2241, 2254, or 2255 of title 28.

(3) Private attorneys shall be appointed in a substantial proportion of the cases. Each plan may include, in addition to the provisions for private attorneys, either of the following or both:

(A) Attorneys furnished by a bar association or a legal aid agency.

(B) Attorneys furnished by a defender organization established in accordance with the provisions of subsection (g).

Prior to approving the plan for a district, the judicial council of the circuit shall supplement the plan with provisions for representation on appeal. The district court may modify the plan at any time with the approval of the judicial council of the circuit. It shall modify the plan when directed by the judicial council of the circuit. The district court shall notify the Administrative Office of the United States Courts of any modification of its plan.

(b) Appointment of counsel

Counsel furnishing representation under the plan shall be selected from a panel of attorneys designated or approved by the court, or from a bar association, legal aid agency, or defender organiza-

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tion furnishing representation pursuant to the plan. [In every criminal case in which the defendant is charged with a felony or a misdemeanor (other than a petty offense as defined in section 1 of this title) or with juvenile delinquency by the commission of an act which, if committed by an adult, would be such a felony or misdemeanor or with a violation of probation and] *In every case in which a person entitled to representation under a plan approved under subsection (a)* appears without counsel, the United States magistrate or the court shall advise the [defendant] *person* that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the [defendant] *person* waives representation by counsel, the United States magistrate or the court, if satisfied after appropriate inquiry that the [defendant] *person* is financially unable to obtain counsel, shall appoint counsel to represent him. Such appointment may be made retroactive to include any representation furnished pursuant to the plan prior to appointment. The United States magistrate or the court shall appoint separate counsel for [defendants] *persons* having interests that cannot properly be represented by the same counsel, or when other good cause is shown.

* * * * * * *

(d) Payment for representation

(1) Hourly rate

Any attorney appointed pursuant to this section or a bar association or legal aid agency or community defender organization which has provided the appointed attorney shall, at the conclusion of the representation or any segment thereof, be compensated at a rate [not exceeding $60 per hour for time expended in court or before a United States magistrate and $40 per hour for time reasonably expended out of court. Such attorney] *not in excess of $50 per hour, unless the Judicial Conference determines that a higher rate of not in excess of $75 per hour is justified for a circuit or for particular districts within a circuit, for time expended in court or before a United States magistrate and for time expended out of court. The Judicial Conference may develop guidelines for determining the maximum hourly rates for each circuit in accordance with the preceding sentence, with variations by district, where appropriate, taking into account such factors as the minimum range of the prevailing hourly rates for qualified attorneys in the district in which the representation is provided and the recommendations of the judicial councils of the circuits. Not less than 3 years after the effective date of the Criminal Justice Act Revision of 1985, the Judicial Conference is authorized to raise the maximum hourly rates specified in this paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay under the General Schedule made pursuant to section 5305 of title 5 on or after such effective date. After the rates are raised under the preceding sentence, such maximum hourly rates may be raised at intervals of not less than 1 year each, up to the aggregate of the overall average percentages of*

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such adjustments made since the last raise was made under this paragraph. Attorneys shall be reimbursed for expenses reasonably incurred, including the costs of transcripts authorized by the United States magistrate or the court.

(2) Maximum amounts

For representation of a defendant before the United States magistrate or the district court, or both, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed **[**$2,000**]** *$5,000* for each attorney in a case in which one or more felonies are charged, and **[**$800**]** *$1,500* for each attorney in a case in which only misdemeanors are charged. For representation of a defendant in an appellate court, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed **[**$2,000**]** *$3,000* for each attorney in each court. **[**For representation in connection with a post-trial motion made after the entry of judgment or in a probation revocation proceeding or for representation provided under subsection (g) the compensation shall not exceed $500 for each attorney in each proceeding in each court.**]** *For any other representation required or authorized by this section, the compensation shall not exceed $1,000 for each attorney in each proceeding.*

(3) Waiving maximum amounts

Payment in excess of any maximum amount provided in paragraph (2) of this subsection may be made **[**for extended or complex representation**]** whenever the court in which the representation was rendered, or the United States magistrate if the representation was furnished exclusively before him, certifies that the amount of the excess payment is necessary to provide fair compensation and the payment is approved by the chief judge of the circuit.

(4) Filing claims

A separate claim for compensation and reimbursement shall be made to the district court for representation before the United States magistrate and the court, and to each appellate court before which the attorney **[**represented the defendant.**]** *provided representation to the person involved.* Each claim shall be supported by a sworn written statement specifying the time expended, services rendered, and expenses incurred while the case was pending before the United States magistrate and the court, and the compensation and reimbursement applied for or received in the same case from any other source. The court shall fix the compensation and reimbursement to be paid to the attorney or to the bar association or legal aid agency or community defender organization which provided the appointed attorney. In cases where representation is furnished exclusively before a United States magistrate, the claim shall be submitted to him and he shall fix the compensation and reimbursement to be paid. In cases where representation is furnished other than before the United States magistrate, the dis-

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trict court, or an appellate court, claims shall be submitted to the district court which shall fix the compensation and reimbursement to be paid.

* * * * * * *

(e) Services other than counsel

(1) Upon request

Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for **[**an adequate defense**]** *adequate representation* may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

[(2) Without prior request

[Counsel appointed under this section may obtain, subject to later review, investigative, expert, or other services without prior authorization if necessary for an adequate defense. The total cost of services obtained without prior authorization may not exceed $150 and expenses reasonably incurred.**]**

(2) Without prior request

(A) Counsel appointed under this section may obtain, subject to later review, investigative, expert, and other services without prior authorization if necessary for adequate representation. Except as provided in subparagraph (B) of this paragraph, the total cost of services obtained without prior authorization may not exceed $300 and expenses reasonably incurred.

(B) The court, or the United States magistrate, if the services were rendered in a case disposed of entirely before the United States magistrate, may, in the interest of justice, and upon the finding that timely procurement of necessary services could not await prior authorization, approve payment for such services after they have been obtained, even if the cost of such services exceeds $300.

(3) Maximum amounts

Compensation to be paid to a person for services rendered by him to a person under this subsection, or to be paid to an organization for services rendered by an employee thereof, shall not exceed **[**$300,**]** *$1,000,* exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is certified by the court, or by the United States magistrate if the services were rendered in connection with a case disposed of entirely before him, as necessary to provided fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit.

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[(g) Discretionary appointments

[Any person subject to revocation of parole, in custody as a material witness, or seeking relief under section 2241, 2254, or 2255 of title 28 may be furnished representation pursuant to the plan whenever the United States magistrate or the court determines that the interests of justice so require and such person is financially unable to obtain representation. Payment for such representation may be as provided in subsection (d) and (e).]

[(h)] ***(g)*** **Defender organization**

(1) Qualifications * * *

(2) Types of defender organizations

(A) Federal Public Defender Organization

A Federal Public Defender Organization shall consist of one or more full-time salaried attorneys. An organization for a district or part of a district or two adjacent districts or parts of districts shall be supervised by a Federal Public Defender appointed by the court of appeals of the circuit, without regard to the provisions of title 5 governing appointments in the competitive service, after considering recommendations from the district court or courts to be served. Nothing contained herein shall be deemed to authorize more than one Federal Public Defender within a single judicial district. The Federal Public Defender shall be appointed for a term of four years, unless sooner removed by the court of appeals of the circuit for incompetency, misconduct in office, or neglect of duty. The compensation of the Federal Public Defender shall be fixed by the court of appeals of the circuit at a rate not to exceed the compensation received by the United States attorney for the district where representation is furnished or, if two districts or parts of districts are involved, the compensation of the higher paid United States attorney of the districts. The Federal Public Defender may appoint, without regard to the provisions of title 5 governing appointments in the competitive service, full-time attorneys in such number as may be approved by the court of appeals of the circuit and other personnel in such number as may be approved by the Director of the Administrative Office of the United States Courts. Compensation paid to such attorneys and other personnel of the organization shall be fixed by the Federal Public Defender at a rate not to exceed that paid to attorneys and other personnel of similar qualifications and experience in the Office of the United States attorney in the district where representation is furnished or, if two districts or parts of districts are involved, the higher compensation paid to persons of similar qualifications and experience in the districts. Neither the Federal Public Defender nor any attorney so appointed by him may engage in the private practice of law. Each organization shall submit to the Director of the Administrative Office of the United States Courts, at the time and in the form pre-

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scribed by him, reports of its activities and financial position and its proposed budget. The Director of the Administrative Office shall submit[, similarly as under title 28, United States Code, section 605, and subject to the conditions of that section] *in accordance with section 605 of title 28,* a budget for each organization for each fiscal year and shall out of the appropriations therefor make payments to and on behalf of each organization. Payments under this subparagraph to an organization shall be in lieu of payments under subsection (d) or (e).

(B) Community Defender Organization

A Community Defender Organization shall be a nonprofit defense counsel service established and administered by any group authorized by the plan to provide representation. The organization shall be eligible to furnish attorneys and receive payments under this section if its bylaws are set forth in the plan of the district or districts in which it will serve. Each organization shall submit to the Judicial Conference of the United States an annual report setting forth its activities and financial position and the anticipated caseload and expenses for the [coming] *next fiscal* year. Upon application an organization may, to the extent approved by the Judicial Conference of the United States:

(i) receive an initial grant for expenses necessary to establish the organization; and

(ii) in lieu of payments under subsection (d) or (e), receive periodic sustaining grants to provide representation and other expenses pursuant to this section.

(3) Malpractice and negligence suits

The Director of the Administrative Office of the United States Courts shall, to the extent the Director considers appropriate, provide representation for and hold harmless, or provide liability insurance for, any person who is an officer or employee of either a Federal Public Defender Organization, or a Community Defender Organization receiving periodic sustaining grants, which is established under this subsection, for money damages for injury, loss of liberty, loss of property, or personal injury or death arising from malpractice or negligence of any such officer or employee in furnishing representational services under this section while acting within the scope of that person's office or employment.

[(i)] *(h)* Rules and reports

Each district court and court of appeals of a circuit shall submit a report on the appointment of counsel within its jurisdiction to the Administrative Office of the United States Courts in such form and at such times as the Judicial Conference of the United States may specify. The Judicial Conference of the United States may, from time to time, issue rules and regulations governing the operation of plans formulated under this section.

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[(j)] *(i)* Appropriations

There are authorized to be appropriated to the United States courts, out of any money in the Treasury not otherwise appropriated, sums necessary to carry out the provisions of this section, *including funds for the continuing education and training of persons providing representational services under this section.* When so specified in appropriation acts, such appropriations shall remain available until expended. Payments from such appropriations shall be made under the supervision of the Director of the Administrative Office of the United States Courts.

[(k) Districts included

[The term "district court" as used in this section includes the District Court of the Virgin Islands, the District Court of Guam, and the district courts of the United States created by chapter 5 of title 28, United States Code.]

(j) Districts included

As used in this section, the term "district court" means each district court of the United States created by chapter 5 of title 28, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, and the District Court of Guam.

[(l)] (*k*) Applicability in the District of Columbia

The provisions of this [Act, other than subsection (h) of section 1,] *section* shall apply in the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit. The provisions of this [Act] *section* shall not apply to the Superior Court of the District of Columbia and the District of Columbia Court of Appeals.

SECTION 223 OF THE COMPREHENSIVE CRIME CONTROL ACT OF 1984

SEC. 223. Title 18 of the United States Code is amended as follows:

(a) * * *

* * * * * * *

[(e) Section 3006A is amended—

[(1) in subsections (a)(1) and (b), by deleting "misdemeanor (other than a petty offense as defined in section 1 of this title)" each place it appears and substituting "Class A misdemeanor"; and

[(2) in subsections (a)(3) and (g), deleting "subject to revocation of parole," each place is appears.]

(e) Section 3006A(a) is amended—

(1) in paragraph (1)(A) by striking out "misdemeanor (other than a petty offense as defined in section 1 of this title)" and inserting in lieu thereof "Class A misdemeanor";

(2) in paragraph (1) by striking out subparagraph (E) and redesignating subparagraphs (F) through (I) as subparagraphs (E) through (H), respectively; and

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(3) in paragraph (2)(A) by striking out "petty offense" and inserting in lieu thereof "Class B or C misdemeanor, or an infraction,".

* * * * * * *

SECTION 1825 OF TITLE 28, UNITED STATES CODE

[§ 1825. Payment of fees

[In any case wherein the United States or an officer or agency thereof, is a party, the United States marshal for the district shall pay all fees of witnesses on the certificate of the United States Attorney or Assistant United States Attorney, and in the proceedings before a united States Commissioner, on the certificate of such commissioner.

[In all proceedings, in forma pauperis, for a writ of habeas corpus or in proceedings under section 2255 of this title, the United States marshal for the district shall pay all fees of witnesses for the party authorized to proceed in forma pauperis, on the certificate of the district judge.

[Fees and mileage need not be tendered to the witness upon service of a subpena issued in behalf of the United States or an officer or agency thereof, or upon service of a subpena issued on behalf of a party, authorized to proceed in forma pauperis, where the payment thereof is to be made by the United States marshal as authorized in this section.]

§ 1825. Payment of fees

(a) In any case in which the United States or an officer or agency of the United States is a party, the United States marshal for the district shall pay all fees of witnesses on the certificate of the United States attorney or assistant United States attorney, and in the proceedings before a United States magistrate, on the certificate of such magistrate, except that any fees of defense witnesses, other than experts, appearing pursuant to subpoenas issued upon approval of the court, shall be paid by the United States marshal for the district—

(1) on the certificate of a Federal public defender or assistant Federal public defender, in a criminal case in which the defendant is represented by such Federal public defender or assistant Federal public defender, and

(2) on the certificate of the clerk of the court upon the affidavit of such witnesses' attendance given by other counsel appointed pursuant to section 3006A of title 18, in a criminal case in which a defendant is represented by such other counsel.

(b) In proceedings in forma pauperis for a writ of habeas corpus, and in proceedings in forma pauperis under section 2255 of this title, the United States marshal for the district shall pay, on the certificate of the district judge, all fees of witnesses for the party authorized to proceed in forma pauperis, except that any fees of witnesses for such party, other than experts, appearing pursuant to subpoenas issued upon approval of the court, shall be paid by the United States marshal for the district—

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(1) on the certificate of a Federal public defender or assistant Federal public defender, in any such proceedings in which a party is represented by such Federal public defender or assistant Federal public defender, and

(2) on the certificate of the clerk of the court upon the affidavit of such witnesses' attendance given by other counsel appointed pursuant to section 3006A of title 18, in any such proceedings in which a party is represented by such other counsel.

(c) Fees and mileage need not be tendered to a witness upon service of a subpoena issued on behalf of the United States or an officer or agency of the United States, upon service of a subpoena issued on behalf of a defendant represented by a Federal public defender, assistant Federal public defender, or other attorney appointed pursuant to section 3006A of title 18, or upon service of a subpoena issued on behalf of a party authorized to proceed in forma pauperis, if the payment of such fees and mileage is to be made by the United States marshal under this section.

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CRIMINAL JUSTICE ACT REVISION OF 1985

Mr. RODINO. Mr. Speaker, I move to suspend the rules and pass the bill (H.R. 3004) to amend section 3006A of title 18, United States Code, to improve the delivery of legal services in the criminal justice system to those persons financially unable to obtain adequate representation, and for other purposes, as amended.

The Clerk read as follows:

H.R. 3004

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Criminal Justice Act Revision of 1985".

SEC. 2. AMENDMENTS TO CRIMINAL JUSTICE ACT.

(a) IN GENERAL.—Section 3006A of title 18, United States Code, is amended as follows:

(1) Subsection (a) is amended by striking out "(1) who is" and all that follows through "subsection (b)." and inserting in lieu thereof the following: "in accordance with this section. Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate representation. Each plan shall provide the following:

"(1) Representation shall be provided for any financially eligible person who—

"(A) is charged with a felony or a misdemeanor (other than a petty offense as defined in section 1 of this title);

"(B) is a juvenile alleged to have committed an act of juvenile delinquency as defined in section 5031 of this title;

"(C) is charged with a violation of probation;

"(D) is under arrest, when such representation is required by law;

"(E) is entitled to appointment of counsel in parole proceedings under chapter 311 of this title;

"(F) is subject to a mental condition hearing under chapter 313 of this title;

"(G) is in custody as a material witness;

"(H) is entitled to appointment of counsel under the sixth amendment to the Constitution; or

"(I) faces loss of liberty in a case, and Federal law requires the appointment of counsel.

"(2) Whenever the United States magistrate or the court determines that the interests of justice so require, representation may be provided for any financially eligible person who—

"(A) is charged with a petty offense for which a sentence to confinement is authorized; or

"(B) is seeking relief under section 2241, 2254, or 2255 of title 28.

"(3) Private attorneys shall be appointed in a substantial proportion of the cases. Each plan may include, in addition to the provisions for private attorneys, either of the following or both:

"(A) Attorneys furnished by a bar association or a legal aid agency.

"(B) Attorneys finished by a defender organization established in accordance with the provisions of subsection (g).".

(2) Subsection (b) is amended—

(A) in the second sentence—

(i) by striking out "In every criminal case" and all that follows through "violation of probation and" and inserting in lieu thereof "In every case in which a person entitled to representation under a plan approved under subsection (a)"; and

(ii) by striking out "defendant" and inserting in lieu thereof "person";

(B) in the third sentence by striking out "defendant" each place it appears and inserting in lieu thereof "person"; and

(C) in the fifth sentence by striking out "defendants" and inserting in lieu thereof "persons".

(3)(A) Subsection (d)(1) is amended by striking out "not exceeding $60" and all that follows through "Such attorney" and inserting in lieu thereof the following: "not in excess of $50 per hour, unless the Judicial Conference determines that a higher rate of not in excess of $75 per hour is justified for

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a circuit or for particular districts within a circuit, for time expended in court before a United States magistrate and for time expended out of court. The Judicial Conference may develop guidelines for determining the maximum hourly rates for each circuit in accordance with the preceding sentence, with variations by district, where appropriate, taking into account such factors as the minimum range of the prevailing hourly rates for qualified attorneys in the district in which the representation is provided and the recommendations of the judicial councils of the circuits. Not less than 3 years after the effective date of the Criminal Justice Act Revision of 1985, the Judicial Conference is authorized to raise the maximum hourly rates specified in this paragraph up to the aggregate of the overall average percentage of the adjustments in the rates of pay under the General Schedule made pursuant to section 5305 of title 5 on or after such effective date. After the rates are raised under the preceding sentence, such maximum hourly rates may be raised at intervals of not less than 1 year each, up to the aggregate of the overal average percentages of such adjustments made since the last raise was made under this paragraph. Attorneys".

(B) Subsection (d)(2) is amended—

(i) in the first sentence—

(I) by striking out "$2,000" and inserting in lieu thereof "$3,000"; and

(II) by striking out "$800" and inserting in lieu thereof "$1,500";

(ii) in the second sentence by striking out "$2,000" and inserting in lieu thereof "$3,000"; and

(iii) by striking out the third sentence and inserting in lieu thereof the following: "For any other representation required or authorized by this section, the compensation shall not exceed $1,000 for each attorney in each proceeding."

(C) Subsection (d)(3) is amended by striking out "for extended or complex representation".

(D) Subsection (d)(4) is amended in the first sentence by striking out "represented the defendant" and inserting in lieu thereof "provided representation to the person involved".

(4)(A) Subsection (e)(1) is amended in the first sentence by striking out "an adequate defense" and inserting in lieu thereof "adequate representation".

(B) Subsection (e)(2) is amended to read as follows:

"(2) WITHOUT PRIOR REQUEST.—(A) Counsel appointed under this section may obtain, subject to later review, investigative, expert, and other services without prior authorization if necessary for adequate representation. Except as provided in subparagraph (B) of this paragraph, the total cost of services obtained without prior authorization may not exceed $300 and expenses reasonably incurred.

"(B) The court, or the United States magistrate, if the services were rendered in a case disposed of entirely before the United States magistrate, may, in the interest of justice, and upon the finding that timely procurement of necessary services could not await prior authorization, approve payment for such services after they have been obtained, even if the cost of such services exceeds $300.".

(C) Subsection (e)(3) is amended by striking out "$300" and inserting in lieu thereof "$1,800".

(5)(A) Subsection (h)(2)(A) is amended by striking out ", similarly as under title 28, United States Code, section 605, and subject to the conditions of that section" and inserting in lieu thereof "in accordance with section 605 of title 28".

(B) Subsection (h)(2)(B) is amended in the third sentence by striking out "coming" and inserting in lieu thereof "next fiscal".

(C) Subsection (h) is amended by adding at the end the following:

"(3) MALPRACTICE AND NEGLIGENCE SUITS.—The Director of the Administrative Office of the United States Courts shall, to the extent the Director considers appropriate, provide representation for and hold harmless, or provide liability insurance for, any person who is an officer or employee of either a Federal Public Defender Organization, or a Community Defender Organization receiving periodic sustaining grants, which is established under this subsection, for money damages for injury, loss of liberty, loss of property, or personal injury or death arising from malpractice or negligence of any such officer or employee in furnishing representational services under this section while acting within the scope of that person's office or employment.".

(6) Subsection (j) is amended by inserting immediately before the period at the end of the first sentence the following: ", including funds for the continuing education and training of persons providing representational services under this section".

(7) Subsection (l) is amended—

(A) by striking out ", other than subsection (h) of section 1,"; and

(B) by striking out "Act" each place it appears and inserting in lieu thereof "section".

(b) TECHNICAL AMENDMENTS.—

(1) Section 3006A of title 18, United States Code, is amended by striking out subsection (g) and redesignating subsections (h) through (l) as subsections (g) through (k), respectively.

(2) Subsection (j) of section 3006A of such title, as redesignated by paragraph (1), is amended to read as follows:

"(j) DISTRICTS INCLUDED.—As used in this section, the term 'district court' means each district court of the United States created by chapter 5 of title 28, the District Court of the Virgin Islands, the District Court of the Northern Mariana Islands, and the District Court of Guam.".

SEC. 3. AMENDMENTS TO COMPREHENSIVE CRIME CONTROL ACT OF 1984.

Section 223(c) of the Comprehensive Crime Control Act of 1984 (Public Law 98-473; 98 Stat. 2028) is amended to read as follows:

"(c) Section 3006A(a) is amended—

"(1) in paragraph (1)(A) by striking out 'misdemeanor (other than a petty offense as defined in section 1 of this title)' and inserting in lieu thereof 'Class A misdemeanor';

"(2) in paragraph (1) by striking out subparagraph (E) and redesignating subparagraphs (F) through (I) as subparagraphs (E) through (H), respectively; and

"(3) in paragraph (2)(A) by striking out 'petty offense' and inserting in lieu thereof 'Class B or C misdemeanor, or an infraction.'.".

SEC. 4. WITNESS FEES.

Section 1825 of title 28, United States Code, is amended to read as follows:

"§ 1825. Payment of fees

"(a) In any case in which the United States or an officer or agency of the United States is a party, the United States marshal for the district shall pay all fees of witnesses on the certificate of the United States attorney or assistant United States attorney, and in the proceedings before a United States magistrate, on the certificate of such magistrate, except that any fees of defense witnesses, other than experts, appearing pursuant to subpoenas issued upon approval of the court, shall be paid by the United States marshal for the district—

"(1) on the certificate of a Federal public defender or assistant Federal public defender, in a criminal case in which the defendant is represented by such Federal public defender or assistant Federal public defender, and

"(2) on the certificate of the clerk of the court upon the affidavit of such witnesses' attendance given by other counsel appointed pursuant to section 3006A of title 18, in a criminal case in which a defendant is represented by such other counsel.

"(b) In proceedings in forma pauperis for a writ of habeas corpus, and in proceedings in forma pauperis under section 2255 of this title, the United States marshal for the district shall pay, on the certificate of the district judge, all fees of witnesses for the party authorized to proceed in forma pauperis, except that any fees of witnesses for such party, other than experts, appearing pursuant to subpoenas issued upon approval of the court, shall be paid by the United States marshal for the district—

"(1) on the certificate of a Federal public defender or assistant Federal public defender, in any such proceedings in which a party is represented by such Federal public defender or assistant Federal public defender, and

"(2) on the certificate of the clerk of the court upon the affidavit of such witnesses' attendance given by other counsel appointed pursuant to section 3006A of title 18, in any such proceedings in which a party is represented by such other counsel.

"(c) Fees and mileage need not be tendered to a witness upon service of a subpoena issued on behalf of the United States or an officer or agency of the United States, upon service of a subpoena issued on behalf of a defendant represented by a Federal public defender, assistant Federal public defender, or other attorney appointed pursuant to section 3006A of title 18, or upon service of a subpoena issued on behalf of a party authorized to proceed to forma pauperis, if the payment of such fees and mileage is to be made by the United States marshal under this section."

SEC. 5. EFFECTIVE DATE.

The amendments made by this Act shall take effect on October 1, 1986, or 120 days after the date of the enactment of this Act, whichever is later.

The SPEAKER pro tempore. Is a second demanded?

Mr. MOORHEAD. Mr. Speaker, I demand a second.

The SPEAKER pro tempore. Without objection, a second will be considered as ordered.

There was no objection.

The SPEAKER pro tempore. The gentleman from New Jersey [Mr. RODINO] will be recognized for 20 minutes and the gentleman from California [Mr. MOORHEAD] will be recognized for 20 minutes.

The Chair recognizes the gentleman from New Jersey [Mr. RODINO].

Mr. RODINO. Mr. Speaker, I yield myself such time as I may consume.

[Mr. RODINO asked and was given permission to revise and extend his remarks.]

Mr. RODINO. Mr. Speaker, I rise in support of H.R. 3004, the Criminal Justice Act Revision of 1985. The Criminal Justice Act (18 U.S.C. 3006A) provides for representation of criminal defendants, material witnesses, and others—including probationers and pa-

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rulers—in Federal court proceedings, when the defendants and others cannot afford to pay for representation. I am pleased that the gentleman from California and ranking minority member of the Subcommittee on Courts, Civil Liberties, and the Administration of Justice [Mr. MOORHEAD], has joined the gentleman from Wisconsin [Mr. KASTENMEIER] who is chairman of the Subcommittee on Courts, Civil Liberties, and the Administration of Justice in cosponsoring the legislation, which was introduced at the request of the Judicial Conference of the United States.

The legislation is primarily an updated version of H.R. 4307, the Criminal Justice Act Revision of 1984, which was reported favorably by the Committee on the Judiciary (H. Rept. 98-764) and passed the House without objection on May 21, 1984. Although H.R. 4307 was not acted on by the other body, some revision of the Criminal Justice Act as contained in the Comprehensive Crime Control Act of 1984 (chapter XIX, Comprehensive Crime Control Act, Public Law 98-473), which doubled the hourly rates—to $40 for out-of-court representation and $60 for in-court representation—and increased the case maximum rates. Although the 1984 amendment was a step in the right direction, more comprehensive revision of the Criminal Justice Act is necessary.

The gentleman from Wisconsin [Mr. KASTENMEIER] and the gentleman from California [Mr. MOORHEAD] introduced H.R. 3004 in response to a request from Federal judges through the Judicial Conference. On November 19, H.R. 3004 was approved with two minor changes by the Committee on the Judiciary by voice vote—no objections. Since H.R. 3004 primarily updates the legislation (H.R. 4307) which passed the House without objection last Congress, and also adds a new noncontroversial section—authorizing Federal public defenders and clerks of the court to certify payment of defense fact witnesses—I am hopeful that H.R. 3004 can be enacted during this Congress. A similar bill, S. 1581, was introduced by the chairman of the Committee on the Judiciary in the other body. In addition to the Judicial Conference, the legislation has wide support this Congress as it did last Congress from such groups as the National Association of Former U.S. Attorneys, the American Bar Association, the National Legal Aid and Defender Association, and the Federal Public and Community Defenders. I know of no opposition to H.R. 3004.

H.R. 3004 will help insure that constitutional mandates for effective assistance of counsel are being met and will improve the administration of justice.

Mr. Speaker, I would like to note that a printing error was made, and the additional cosponsors on H.R. 3004—Mr. BROOKS, Mr. MAZZOLI, Mr. SYNAR, Mrs. SCHROEDER, Mr. FRANK, Mr. MORRISON of Connecticut, Mr. BERMAN, and Mr. BOUCHER—were omitted from the reported bill, and the additional cosponsors listed on the reported bill were from a different bill, H.R. 1524, which was reported at the same time. A star print will be printed to reflect the correct cosponsors.

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Mr. Speaker, I reserve the balance of my time.

Mr. MOORHEAD. Mr. Speaker, I yield myself such time as I may consume.

(Mr. MOORHEAD asked and was given permission to revise and extend his remarks.)

Mr. MOORHEAD. Mr. Speaker, I rise in support of H.R. 3004, and I want to join with our committee chairman in the comments he has already made. I wish to compliment our subcommittee chairman, the gentleman from Wisconsin [Mr. KASTENMEIER] for his leadership in drafting this legislation.

It has a wide range of support, including the U.S. Judicial Conference, bar associations from around the country, including California Attorneys for Criminal Justice, the State Bar of California, the Los Angeles County Bar Association, the Bar Association of San Francisco, the ninth circuit, the American Bar Association, and the National Association of Former U.S. Attorneys. The original bill, last Congress, was criticized by the Department of Justice primarily because it had no hourly maximums and to that bill's somewhat expanded coverage. However, both of these criticisms were met by the legislation before us today. The Department of Justice has not taken a position on the legislation before us this afternoon, but the administration has now said they have no objection whatsoever to the bill.

H.R. 3004 precisely defines circumstances under which a poor person who cannot afford an attorney, and is charged with a Federal crime, is entitled to an attorney appointed by the Federal court. This legislation has nothing to do with the Legal Services Corporation, which handles civil cases involving the poor.

Last year, the Congress enacted and the President signed the Comprehensive Crime Control Act of 1984 (Public Law 98-473) which contained a provision added by the other body which actually increased the hourly rates from $30 and $20 an hour to $60 and $40, respectively. This was the first increase in these rates in 15 years and was done as an emergency measure until more time could be directed at an entire revision of the Criminal Justice Act, and that is what H.R. 3004, which is before you today, is all about.

Present law provides for $60 an hour for in-court time and $40 an hour for out-of-court time. H.R. 3004 sets a general maximum rate of $50 per hour, with an absolute maximum of $75 per hour. No distinction is made between in court and out-of court time. A cost-of living increase may occur after 3 years, but that is left to the discretion of the U.S. Judicial Conference. Overall, the Criminal Justice Act expenditures in 1985 were approximately $60 million. Under the new fee structure contained in H.R. 3004 the projected dollar increase above and beyond the $60 million figure is between $6 and $10 million, depending on how many districts select and receive the higher fees under the bill.

Mr. Speaker, this is important legislation and I hope we can move it through the process quickly. I don't believe that anyone expects taxpayers to pay criminal defense lawyers at the same rates that our big corporations pay for their own attorneys, and what this legislation provides is substantially less than that. But it does not make sense to fight crime by providing money for our police, and for our jails, if the court processes are bogged-down or if convictions of criminals are ultimately reversed for lack of effective assistance of an attorney.

Mr. Speaker, the administration has no objection to the bill. I am not aware of any opposition to H.R. 3004. It has the unanimous support of the Judiciary Committee. In 1984 this bill was considered on the House floor under suspension of the rules and passed by voice vote with no objection heard.

I urge my colleagues to vote in favor of H.R. 3004.

Mr. RODINO. Mr. Speaker, I yield such time as he may consume to the gentleman from Wisconsin [Mr. KASTENMEIER], the chairman of the Subcommittee on Courts, Civil Liberties, and the Administration of Justice.

(Mr. KASTENMEIER asked and was given permission to revise and extend his remarks.)

Mr. KASTENMEIER. I thank the gentleman for yielding time to me and for handling this bill for me.

Mr. Speaker, I think this is an important bill. It does, as both the chairman and ranking minority member, the gentleman from California [Mr. MOORHEAD], have suggested, and it involved a great deal of time on the part of the committee.

I rise in support of H.R. 3004, the Criminal Justice Act Revision of 1985. The Criminal Justice Act (18 U.S.C. 3006A) provides for representation of criminal defendants, material witnesses, and others—including probationers and parolees—in Federal court proceedings, when the defendants and others cannot afford to pay for representation. I am pleased that the gentleman from California and ranking minority member of the subcommittee, Mr. MOORHEAD, has joined me in cosponsoring the legislation, which was introduced at the request of the Judicial Conference of the United States.

The legislation is primarily an updated version of H.R. 4307, the Criminal Justice Act Revision of 1984, which passed the

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House without objection on May 21, 1984. Although H.R. 4307 was not acted on by the other body, some revision of the Criminal Justice Act was contained in the Comprehensive Crime Control Act of 1984. Although the 1984 amendment was a step in the right direction, more comprehensive revision of the Criminal Justice Act is necessary, and has been requested by the Judicial Conference.

Since H.R. 3004 primarily updates the legislation—H.R. 4307—which passed the House without objection last Congress, I am hopeful that H.R. 3004 can be enacted during this Congress. In addition, to the Judicial Conference, the legislation has wide support in this Congress as it did last Congress from such groups as the National Association of Former U.S. Attorneys, the American Bar Association, the National Legal Aid and Defender Association, and the Federal Public and Community Defenders. I know of no opposition to H.R. 3004.

H.R. 3004 will help insure that constitutional mandates for effective assistance of counsel are being met and will improve the administration of justice.

H.R. 3004 provides:

First, variation of the hourly rates among districts and circuits to account for differences in economic conditions. Most districts would allow $50 per hour, but in a few districts—if the need is shown—the rate could be $75 per hour.

Second, elimination of the compensation rate differential for in-court and out-of court hours—to generally allow $50 per hour instead of the $60/$40 differential rates.

Third, future increase in the hourly rates based on cost-of-living salary adjustments given to Federal employees.

Fourth, further increases in the case compensation maximums and modification of the standard for waiving the maximums. For example, case maximums would rise from $2,000 to $5,000 for a felony, and from $800 to $1,500 for a misdemeanor.

Fifth, increases in compensation limits pertaining to investigative, expert, and other services, with and without prior authorization, and provision for nunc pro tunc authorization in appropriate circumstances. H.R. 3004 would raise the current limit of $150 to $300 for services without advance permission, and from $300 to $1,000 for services with permission or in appropriate circumstances nunc pro tunc.

Sixth, authority to appoint counsel for financially eligible persons charged with a petty offense, where confinement is authorized and representation is determined to be in the interest of justice; that is, where there is a likelihood or possibility of confinement.

Seventh, mandatory appointment of counsel for financially eligible material witnesses in custody.

Eighth, professional liability protection for Federal defenders, or, in the alternative, providing representation and holding them harmless.

Ninth, funding for the continuing education and training of persons providing representational services under the act.

Tenth, authorization for the option of the establishment of a Federal defender organization for the U.S. District Court of the District of Columbia, as is available in every other district.

Eleventh, an amendment to section 1825 of title 28, United States Code, to authorize Federal public defenders and district court clerks on behalf of other CJA counsel to certify the payment of defense fact witness fees in Federal criminal cases. Currently this certification is performed by U.S. attorneys and assistant U.S. attorneys, which may create a conflict of interest and has been administratively burdensome to them.

The amendment approved in the committee and supported by the administrative office of the U.S. courts will insure that hearings on mental conditions, not merely on mental competency, are covered. This is the current law, and the language change reflects the original intent of the administrative office to conform to current law, as amended in the Comprehensive Crime Control Act of 1984. The committee amendment also delays the effective date until October 1, 1986, or later, so as to remove any Budget Act objections. The projected cost of H.R. 3004, as reported by the Congressional Budget Office, will be approximately $9.5 million for each fiscal year—fiscal year 1987–89—and $11.3 million in fiscal year 1990. These costs are moderate and necessary to insure that adequate representation is provided to persons in the Federal criminal justice system.

This legislation is a high priority of Federal judges, and I hope you will support it.

Mr. MOORHEAD. Mr. Speaker, I yield such time as he may consume to the gentleman from New York [Mr. FISH].

(Mr. FISH asked and was given permission to revise and extend his remarks.)

Mr. FISH. I thank the gentleman for yielding time to me.

Mr. Speaker, I want to commend the chairman of the full committee, the chairman of the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, and the ranking minority member, for bringing these Criminal Justice Act amendments before us.

I would like to commend the subcommittee for its work product contained in H.R. 3004, Criminal Justice Act amendments. Lawyers who represent indigent criminal defendants perform a difficult but socially important task.

Ninety percent of all criminal defendants are indigent. Lawyers who are court appointed to represent them do not, for the most part, have fancy offices. And the rates they are paid for this work make it difficult to hire investigators and even clerical help. Except for some emergency relief last year, these lawyers have not had a salary increase in the last 15 years.

In testimony before our committee we have been advised that, with increasing frequency, experienced lawyers are, in fact resigning from the Criminal Justice Act panels. Many of those lawyers who do accept Criminal Justice Act appointments do so reluctantly. Those who do accept cases are oftentimes sole practitioners or members of small firms. The economic burden on them is even greater than it is on attorneys from larger firms. Judges have indicated that they are now expending more time and effort than is reasonable—in view of their other responsibilities—in attempting to locate qualified attorneys who are willing to accept appointments. Delay in the appointment of an attorney is, in my opinion, a severe limit to timely access to counsel, thus in effect depriving the poor of rights guaranteed by our Constitution. I believe, everybody in this Chamber would agree, that economic factors must not be permitted to regulate the application of constitutional rights.

The sixth amendment guarantees every person charged with a crime, rich or poor, the right to the effective assistance of an attorney. Society must pay for that service when the accused cannot. It's also equally as important, that attorneys, who are charged with the responsibility of making our system of justice work, be adequately compensated to maintain a high quality of representation for indigent defendants. This legislation is long overdue and I urge my colleagues to vote in favor of H.R. 3004.

Mr. RODINO. Mr. Speaker, I have no further requests for time, and I yield back the balance of my time.

Mr. MOORHEAD. Mr. Speaker, I have no further requests for time, and I yield back the balance of my time.

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from New Jersey [Mr. RODINO] that the House suspend the rules and pass the bill, H.R. 3004, as amended.

The question was taken; and (two-thirds having voted in favor thereof) the rules were suspended and the bill, as amended, was passed.

A motion to reconsider was laid on the table.

GENERAL LEAVE

Mr. RODINO. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks, and include extraneous matter, on H.R. 3004, as amended, the bill just passed.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from New Jersey?

There was no objection.

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APPENDIX 2

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTOR

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

WILLIAM JAMES WELLER
LEGISLATIVE AFFAIRS
OFFICER

April 18, 1985

Honorable Peter W. Rodino, Jr.
Chairman, Committee on the Judiciary
U.S. House of Representatives
Room 2137, Rayburn House Office Building
Washington, D. C. 20515

Dear Mr. Chairman:

Enclosed is a copy of Mr. Spaniol's letter to the Speaker of the House transmitting, on behalf of the Judicial Conference of the United States, a draft bill to revise the Criminal Justice Act (CJA). As Mr. Spaniol's letter notes, the draft bill is substantially the same as draft legislation previously submitted by the Judicial Conference and represents a more comprehensive approach toward improvement of the operation of the CJA than the recently enacted CJA Revision of 1984 (chapter XIX of the Comprehensive Crime Control Act of 1984), which addressed only attorney compensation. The provisions of the draft bill are explained in greater detail in Mr. Spaniol's letter and the accompanying materials.

On behalf of the Judicial Conference, I thank you for whatever consideration your Committee may be able to give this request.

Sincerely,

William James Weller

William James Weller
Legislative Affairs Officer

Enclosure

cc: Honorable Hamilton Fish, Jr.

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ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTOR

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

April 18, 1985

Honorable Thomas P. O'Neill, Jr.
Speaker of the House
U.S. House of Representatives
Room H204, Capitol Building
Washington, D. C. 20515

Dear Mr. Speaker:

The Judicial Conference of the United States transmitted to the last two Congresses draft legislation to amend the Criminal Justice Act (CJA), 18 U.S.C. § 3006A. The purpose of the proposed amendments was to increase the compensation available to attorneys and other persons providing representation under the CJA, as well as to update and streamline its operation. CJA revision bills embodying the Judicial Conference proposals were introduced in both the 97th (H.R. 5190) and 98th (S. 2420, H.R. 4307) Congresses. Although H.R. 4307 was passed by the House of Representatives, none of these bills was enacted into law.

A partial increase in CJA compensation was enacted, however, as "The Criminal Justice Act Revision of 1984," Chapter XIX of the Comprehensive Crime Control Act of 1984 (P.L. 98-473, 98 Stat. 1837, October 12, 1984). The Judicial Conference welcomes this adjustment, which doubled the hourly rates for attorney compensation by raising the limits to $60 per hour for in-court time and $40 per hour for out-of-court time. Also doubled by the CJA Revision of 1984 were the case compensation maximums. While we are hopeful that this compensation increase -- the first in fourteen years -- will encourage more qualified and experienced attorneys to accept appointments under the CJA, and thereby serve to improve the quality of representation, we note that the CJA Revision of 1984 did not address several of the very important issues that would have been resolved by the bills supported by the Judicial Conference. Among the most significant of these are provisions for:

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1. Variation of the hourly rates among districts and circuits to account for differences in economic conditions;

2. Elimination of the compensation rate differential for in-court and out-of-court hours;

3. Future increases in the hourly rates based upon cost-of-living salary adjustments given to federal employees;

4. Further increases in the case compensation maximums and modification of the standard for waiving the maximums;

5. Increases in compensation limits pertaining to investigative, expert and other services, with and without prior authorization, and provision for nunc pro tunc authorization in appropriate circumstances;

6. Authority to appoint counsel for financially eligible persons charged with a petty offense, where confinement is authorized and representation is determined to be in the interest of justice;

7. Mandatory appointment of counsel for financially eligible material witnesses in custody;

8. Professional liability protection for federal defenders;

9. Funding for the continuing education and training of persons providing representational services under the Act; and

10. Authorization for the establishment of a federal defender organization for the United States District Court for the District of Columbia.

Accordingly, on behalf of the Judicial Conference, I am once again transmitting for Congressional consideration a draft bill to revise the CJA. The draft bill incorporates, with minor technical revisions, each of the provisions of H.R. 4307. In addition, Section 4 of the bill would amend Section 1825 of title 28, United States Code, to authorize federal public defenders and other counsel appointed under the CJA to certify the payment of defense fact witness fees in federal criminal cases. Currently this certification is performed by U.S. attorneys and assistant U.S. attorneys,

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thus posing the potential for conflict of interest and also creating an administrative burden for prosecutors.

The language of the witness fee provision is identical to H.R. 5189 (97th Congress) which was introduced by Congressman Kastenmeier upon request of the Judicial Conference. While the concept embodied in H.R. 5189 has had the support of the Department of Justice through the last two Administrations as well as the support of the judiciary, no action was taken on it by the 97th Congress.

For your information, I have enclosed, along with the draft bill (1) a comparative text reflecting changes in existing law, (2) a section-by-section analysis and (3) a chart comparing the provisions of the draft bill with the CJA Revision of 1984.

Representatives of the Judicial Conference and Administrative Office personnel will, of course, provide whatever assistance the Congress may request in reviewing this proposal.

Sincerely,

Joseph F. Spaniol, Jr.
Deputy Director

Enclosures

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"CRIMINAL JUSTICE ACT REVISION OF 1985" -- CHANGES IN EXISTING LAW

[New language appears in italics, language to be deleted is struck through]

Section 3006A of Title 18, United States Code.

(a) CHOICE OF PLAN. -- Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation ~~(1) who is charged with a felony or misdemeanor (other than a petty offense as defined in section 1 of this title) or with juvenile delinquency by the commission of an act which, if committed by an adult, would be such a felony or misdemeanor or with a violation of probation, (2) who is under arrest, when such representation is required by law, (3) who is subject to revocation of parole, in custody as a material witness, or seeking collateral relief, as provided in subsection (g), (4) whose mental condition is the subject of a hearing pursuant to chapter 313 of this title, or (5) for whom the Sixth Amendment to the Constitution requires the appointment of counsel or for whom, in a case in which he faces loss of liberty, any Federal law requires the appointment of counsel.~~ Representation under each plan shall include counsel and investigative, expert, and other services necessary for an adequate defense. Each plan shall include a provision for private attorneys. The plan may include, in addition to a provision for private attorneys in a

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~~substantial-proportion-of-cases,-either-of-the-following-or both:~~

~~(1)--attorneys-furnished-by-a-bar-association-or-a legal aid-agency;-or~~

~~(2)--attorneys-furnished-by-a-defender-organization established-in-accordance-with-the-provisions-of subsection-(h);~~ *in accordance with this section. Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate representation. Each plan shall provide the following:*

(1) Representation shall be provided for any financially eligible person who --

(A) is charged with a felony or a misdemeanor (other than a petty offense as defined in section 1 of this title);

(B) is a juvenile alleged to have committed an act of juvenile delinquency as defined in section 5031 of this title;

(C) is charged with a violation of probation;

(D) is under arrest, when such representation is required by law;

(E) is entitled to appointment of counsel in parole proceedings under chapter 311 of this title;

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(F) is subject to a mental competency hearing under chapter 313 of this title;

(F) is in custody as a material witness;

(H) is entitled to appointment of counsel under the Sixth amendment to the Constitution; or

(I) faces loss of liberty in a case, and Federal law requires the appointment of counsel.

(2) Whenever the United States magistrate or the court determines that the interests of justice so require, representation may be provided for any financially eligible person who --

(A) is charged with a petty offense for which a sentence to confinement is authorized; or

(B) is seeking relief under section 2241, 2254, or 2255 of title 28.

(3) Private attorneys shall be appointed in a substantial proportion of the cases. Each plan may include, in addition to the provisions for private attorneys, either of the following or both:

(A) Attorneys furnished by a bar association or a legal aid agency.

(B) Attorneys furnished by a defender organization established in accordance with the provisions of subsection (g).

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Prior to approving the plan for a district, the judicial council of the circuit shall supplement the plan with provisions for representation on appeal. The district court may modify the plan at any time with the approval of the judicial council of the circuit. It shall modify the plan when directed by the judicial council of the circuit. The district court shall notify the Administrative Office of the United States Courts of any modification of its plan.

(b) APPOINTMENT OF COUNSEL. -- Counsel furnishing representation under the plan shall be selected from a panel of attorneys designated or approved by the court, or from a bar association, legal aid agency, or defender organization furnishing representation pursuant to the plan. ~~In every criminal case in which the defendant is charged with a felony or a misdemeanor (other than a petty offense as defined in section 1 of this title) or with juvenile delinquency by the commission of an act which, if committed by an adult, would be such a felony or misdemeanor or with a violation of probation~~ and *In every case in which a person entitled to representation under a plan approved under subsection (a)* appears without counsel, the United States magistrate or the court shall advise the ~~defendant~~ *person* that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel.

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Unless the ~~defendant~~ *person* waives representation by counsel, the United States magistrate or the court, if satisfied after appropriate inquiry that the ~~defendant~~ *person* is financially unable to obtain counsel, shall appoint counsel to represent him. Such appointment may be made retroactive to include any representation furnished pursuant to the plan prior to appointment. The United States magistrate or the court shall appoint separate counsel for ~~defendants~~ *persons* having interests that cannot properly be represented by the same counsel, or when other good cause is shown.

(c) DURATION AND SUBSTITUTION OF APPOINTMENTS. -- A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate or the court through appeal, including ancillary matters appropriate to the proceedings. If at any time after the appointment of counsel the United States magistrate or the court finds that the person is financially able to obtain counsel or to make partial payment for the representation, it may terminate the appointment of counsel or authorize payment as provided in subsection (f), as the interests of justice may dictate. If at any stage of the proceedings, including an appeal, the United States magistrate or the court finds that the person is financially unable to pay counsel whom he had retained, it may

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appoint counsel as provided in subsection (b) and authorize payment as provided in subsection (d), as the interests of justice may dictate. The United States magistrate or the court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings.

(d) PAYMENT FOR REPRESENTATION. --

(1) HOURLY RATE. -- Any attorney appointed pursuant to this section or a bar association or legal aid agency or community defender organization which has provided the appointed attorney shall, at the conclusion of the representation or any segment thereof, be compensated at a rate ~~not exceeding $60 per hour for time expended in court or before a United States magistrate and $40 per hour for time reasonably expended out of court. Such attorney~~ *not in excess of $50 per hour, unless the Judicial Conference determines that a higher rate of not in excess of $75 per hour is justified for a circuit or for particular districts within a circuit, for time expended in court or before a United States magistrate and for time expended out of court. The Judicial Conference may develop guidelines for determining the maximum hourly rates for each circuit in accordance with the preceding sentence, with variations by district, where appropriate, taking into account such factors as the minimum range of the*

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prevailing hourly rates for qualified attorneys in the district in which the representation is provided and the recommendations of the judicial councils of the circuits. Not less than three years after the effective date of the Criminal Justice Act Revision of 1985, the Judicial Conference is authorized to raise the maximum hourly rates specified in this paragraph up to the aggregate of the overall percentages of the adjustments in the rates of pay under the General Schedule made pursuant to section 5305 of title 5 on or after such effective date. After the rates are raised under the preceding sentence, such maximum hourly rates may be raised at intervals of not less than one year each, up to the aggregate of the overall average percentages of such adjustments made since the last raise was made under this paragraph. Attorneys shall be reimbursed for expenses reasonably incurred, including the costs of transcripts authorized by the United States magistrate or the court.

(2) MAXIMUM AMOUNTS. -- For representation of a defendant before the United States magistrate or the district court, or both, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed ~~$2,000~~ *$5,000* for each attorney in a case in which one or more felonies are charged, and ~~$800~~ *$1,500* for each attorney in a case in which only misdemeanors

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are charged. For representation of a defendant in an appellate court, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed ~~$2,000~~ *$3,000* for each attorney in each court. ~~For representation in connection with a post-trial motion made after the entry of judgment or in a probation revocation proceeding or for representation provided under subsection (g) the compensation shall not exceed $500 for each attorney in each proceeding in each court.~~ *For any other representation required or authorized by this section, the compensation shall not exceed $1,000 for each attorney in each proceeding.*

(3) WAIVING MAXIMUM AMOUNTS. -- Payment in excess of any maximum amount provided in paragraph (2) of this subsection may be made ~~for extended or complex representation~~ whenever the court in which the representation was rendered, or the United States magistrate if the representation was furnished exclusively before him, certifies that the amount of the excess payment is necessary to provide fair compensation and the payment is approved by the chief judge of the circuit.

(4) FILING CLAIMS. -- A separate claim for compensation and reimbursement shall be made to the district court for representation before the United States magistrate and the

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court, and to each appellate court before which the attorney ~~represented the defendant~~ *provided representation to the person involved*. Each claim shall be supported by a sworn written statement specifying the time expended, services rendered, and expenses incurred while the case was pending before the United States magistrate and the court, and the compensation and reimbursement applied for or received in the same case from any other source. The court shall fix the compensation and reimbursement to be paid to the attorney or to the bar association or legal aid agency or community defender organization which provided the appointed attorney. In cases where representation is furnished exclusively before a United States magistrate, the claim shall be submitted to him and he shall fix the compensation and reimbursement to be paid. In cases where representation is furnished other than before the United States magistrate, the district court, or an appellate court, claims shall be submitted to the district court which shall fix the compensation and reimbursement to be paid.

(5) NEW TRIALS. -- For purposes of compensation and other payments authorized by this section, an order by a court granting a new trial shall be deemed to initiate a new case.

(6) PROCEEDINGS BEFORE APPELLATE COURTS. -- If a person

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for whom counsel is appointed under this section appeals to an appellate court or petitions for a writ of certiorari, he may do so without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28.

(e) SERVICES OTHER THAN COUNSEL. --

(1) UPON REQUEST. -- Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for ~~an adequate defense~~ *adequate representation* may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

~~(2) WITHOUT PRIOR REQUEST. Counsel appointed under this section may obtain, subject to later review, investigative, expert, or other services without prior authorization if necessary for an adequate defense. The total cost of services obtained without prior authorization may not exceed $150 and expenses reasonably incurred.~~

(2) WITHOUT PRIOR REQUEST. -- (A) Counsel appointed

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under this section may obtain, subject to later review, investigative, expert, and other services without prior authorization if necessary for adequate representation. Except as provided in subparagraph (B) of this paragraph, the total cost of services obtained without prior authorization may not exceed $300 and expenses reasonably incurred.

(B) The court, or the United States magistrate, if the services were rendered in a case disposed of entirely before the United States magistrate, may, in the interest of justice, and upon the finding that timely procurement of necessary services could not await prior authorization, approve payment for such services after they have been obtained, even if the cost of such services exceeds $300.

(3) MAXIMUM AMOUNTS. -- Compensation to be paid to a person for services rendered by him to a person under this subsection, or to be paid to an organization for services rendered by an employee thereof, shall not exceed ~~$300~~ *$1,000*, exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is certified by the court, or by the United States magistrate if the services were rendered in connection with a case disposed of entirely before him, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit.

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(f) RECEIPT OF OTHER PAYMENTS. -- Whenever the United States magistrate or the court finds that funds are available for payment from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid to the appointed attorney, to the bar association or legal aid agency or community defender organization which provided the appointed attorney, to any person or organization authorized pursuant to subsection (e) to render investigative, expert, or other services, or to the court for deposit in the Treasury as a reimbursement to the appropriation, current at the time of payment, to carry out the provisions of this section. Except as so authorized or directed, no such person or organization may request or accept any payment or promise of payment for representing a defendant.

~~(g)--DISCRETIONARY-APPOINTMENTS.----Any-person-subject-to revocation-of-parole,-in-custody-as-a-material-witness,-or seeking-relief-under-section-2241,-2254,-or-2255-of-title-28 may-be-furnished-representation-pursuant-to-the-plan-whenever the-United-States-magistrate-or-the-court-determines-that-the interests-of-justice-so-require-and-such-person-is-financially unable-to-obtain-representation.--Payment-for-such representation-may-be-as-provided-in-subsections-(d)-and-(e).~~

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~~(h)~~ *(g)* DEFENDER ORGANIZATION. --

(1) QUALIFICATIONS. -- A district or a part of a district in which at least two hundred persons annually require the appointment of counsel may establish a defender organization as provided for either under subparagraphs (A) or (B) of paragraph (2) of this subsection or both. Two adjacent districts or parts of districts may aggregate the number of persons required to be represented to establish eligibility for a defender organization to serve both areas. In the event that adjacent districts or parts of districts are located in different circuits, the plan for furnishing representation shall be approved by the judicial council of each circuit.

(2) TYPES OF DEFENDER ORGANIZATIONS. --

(A) FEDERAL PUBLIC DEFENDER ORGANIZATION. -- A Federal Public Defender Organization shall consist of one or more full-time salaried attorneys. An organization for a district or part of a district or two adjacent districts or parts of districts shall be supervised by a Federal Public Defender appointed by the court of appeals of the circuit, without regard to the provisions of title 5 governing appointments in the competitive service, after considering recommendations from the district court or courts to be served. Nothing contained herein shall be deemed to authorize more than one Federal Public Defender within a single judicial district. The

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Federal Public Defender shall be appointed for a term of four years, unless sooner removed by the court of appeals of the circuit for incompetency, misconduct in office, or neglect of duty. The compensation of the Federal Public Defender shall be fixed by the court of appeals of the circuit at a rate not to exceed the compensation received by the United States attorney for the district where representation is furnished or, if two districts or parts of districts are involved, the compensation of the higher paid United States attorney of the districts. The Federal Public Defender may appoint, without regard to the provisions of title 5 governing appointments in the competitive service, full-time attorneys in such number as may be approved by the court of appeals of the circuit and other personnel in such number as may be approved by the Director of the Administrative Office of the United States Courts. Compensation paid to such attorneys and other personnel of the organization shall be fixed by the Federal Public Defender at a rate not to exceed that paid to attorneys and other personnel of similar qualifications and experience of the Office of the United States Attorney in the district where representation is furnished or, if two districts or parts of districts are involved, the higher compensation paid to persons of similar qualifications and experience in the districts. Neither the Federal Public Defender nor any attorney so appointed by him may engage in the private

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practice of law. Each organization shall submit to the Director of the Administrative Office of the United States Courts, at the time and in the form prescribed by him, reports of its activities and financial position and its proposed budget. The Director of the Administrative Office shall submit, ~~similarly as under title 28, United States Code, section 605, and subject to the conditions of that section~~ *in accordance with section 605 of title 28,* a budget for each organization for each fiscal year and shall out of the appropriations therefor make payments to and on behalf of each organization. Payments under this subparagraph to an organization shall be in lieu of payments under subsection (d) or (e).

(B) COMMUNITY DEFENDER ORGANIZATION. -- A Community Defender Organization shall be a nonprofit defense counsel service established and administered by any group authorized by the plan to provide representation. The organization shall be eligible to furnish attorneys and receive payments under this section if its bylaws are set forth in the plan of the district or districts in which it will serve. Each organization shall submit to the Judicial Conference of the United States an annual report setting forth its activities and financial position and the anticipated caseload and expenses for the ~~coming~~ *next fiscal* year. Upon application an

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organization may, to the extent approved by the Judicial Conference of the United States:

(i) receive an initial grant for expenses necessary to establish the organization; and

(ii) in lieu of payments under subsection (d) or (e), receive periodic sustaining grants to provide representation and other expenses pursuant to this section.

(3) *MALPRACTICE AND NEGLIGENCE SUITS. -- The Director of the Administrative Office of the United States Courts shall, to the extent the Director considers appropriate, provide representation for and hold harmless, or provide liability insurance for, any person who is an officer or employee of either a Federal Public Defender Organization, or a Community Defender Organization which is receiving periodic sustaining grants, established under this subsection, for money damages for injury, loss of liberty, loss of property, or personal injury or death arising from malpractice or negligence of any such officer or employee in furnishing representational services under this section while acting within the scope of that person's office or employment.*

~~(i)~~ *(h)* RULES AND REPORTS. -- Each district court and court of appeals of a circuit shall submit a report on the

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appointment of counsel within its jurisdiction to the Administrative office of the United States Courts in such form and at such times as the Judicial Conference of the United States may specify. The Judicial Conference of the United States may, from time to time, issue rules and regulations governing the operation of plans formulated under this section.

~~(j)~~ *(i)* APPROPRIATIONS. -- There are authorized to be appropriated to the United States courts, out of any money in the Treasury not otherwise appropriated, sums necessary to carry out the provisions of this section, *including funds for the continuing education and training or persons providing representational services under this section.* When so specified in appropriation acts, such appropriations shall remain available until expended. Payments from such appropriations shall be made under the supervision of the Director of the Administrative Office of the United States Courts.

~~(k)--Districts-Included.----The-term-"district-court"-as used-in-this-section-includes-the-District-Court-of-the-Virgin Islands,-the-District-Court-of-Guam,-and-the-district-courts of-the-United-States-created-by-chapter-5-of-title-28,-United States-Code.~~

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(j) DISTRICTS INCLUDED. -- As used in this section, the term "district court" means each district court of the United States created by chapter 5 of title 28, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, and the District Court of Guam.

~~(k)~~*(k)* APPLICABILITY IN THE DISTRICT OF COLUMBIA. -- The provisions of this ~~Act, other than subsection (h) of section~~ *section* shall apply in the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit. The provisions of this ~~Act~~ *section* shall not apply to the Superior Court of the District of Columbia and the District of Columbia Court of Appeals.

Section 1825 of Title 28, United States Code. Payment of fees

~~In any case wherein the United States or an officer or agency thereof, is a party, the United States marshal for the district shall pay all fees of witnesses on the certificate of the United States Attorney or Assistant United States Attorney, and in the proceedings before a United States Commissioner, on the certificate of such commissioner.~~

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~~In all proceedings, in forma pauperis, for a writ of habeas corpus or in proceedings under section 2255 of this title, the United States marshal for the district shall pay all fees of witnesses for the party authorized to proceed in forma pauperis, on the certificate of the district judge.~~

~~Fees and mileage need not be tendered to the witness upon service of a subpena issued in behalf of the United States or an officer or agency thereof, or upon service of a subpena issued on behalf of a party authorized to proceed in forma pauperis, where the payment thereof is to be made by the United States marshal as authorized in this section.~~

"1825. Payment of fees

"(a) In any case in which the United States or an officer or agency of the United States is a party, the United States marshal for the district shall pay all fees of witnesses on the certificate of the United States attorney or assistant United States attorney, and in the proceedings before a United States magistrate, on the certificate of such magistrate, except that any fees of defense witnesses, other than experts, appearing pursuant to subpoenas issued upon approval of the court, shall be paid by the United States marshal for the

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district--

"(1) on the certificate of a Federal public defender or assistant Federal public defender, in a criminal case in which the defendant is represented by such Federal public defender or assistant Federal public defender, and

"(2) on the certificate of the clerk of the court upon the affidavit of such witnesses' attendance given by other counsel appointed pursuant to section 3006A of title 18, in a criminal case in which a defendant is represented by such other counsel.

"(b) In proceedings in forma pauperis for a writ of habeas corpus, and in proceedings in forma pauperis under section 2255 of this title, the United States marshal for the district shall pay, on the certificate of the district judge, all fees of witnesses for the party authorized to proceed in forma pauperis, except that any fees of witnesses for such party, other than experts, appearing pursuant to subpoenas issued upon approval of the court, shall be paid by the United States marshal for the district--

"(1) on the certificate of a Federal public defender or assistant Federal public defender, in any such proceedings in

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which a party is represented by such Federal public defender or assistant Federal public defender, and

"(2) on the certificate of the clerk of the court upon the affidavit of such witnesses' attendance given by other counsel appointed pursuant to section 3006A of title 18, in any such proceedings in which a party is represented by such other counsel.

"(c) Fees and mileage need not be tendered to a witness upon service of a subpoena issued on behalf of the United States or an officer or agency of the United States, upon service of a subpoena issued on behalf of a defendant represented by a Federal public defender, assistant Federal public defender, or other attorney appointed pursuant to section 3006A of title 18, or upon service of a subpoena issued on behalf of a party authorized to proceed in forma pauperis, if the payment of such fees and mileage is to be made by the United States marshal under this section."

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"The Criminal Justice Act Revision of 1985"
Section-by-Section Analysis

SECTION 1 provides that the Act may be cited as "the Criminal Justice Act Revision of 1985".

SECTION 2 amends 18 U.S.C. 3006A in the following manner:

(a) Adequate Representation of Defendants

Subsection (a) has been restructured for purposes of clarity and to incorporate changes in the law since the last comprehensive revision of the Criminal Justice Act (hereinafter referred to as "CJA") in 1970. Mandatory appointments are listed in paragraph (a)(1) and discretionary appointments (previously found in subsection (g)) are now located directly below in paragraph (a)(2).

Paragraph (a)(1) has been amended to provide separately for mandatory representation of those charged with juvenile delinquency, a probation violation, or a felony or misdemeanor. Thus, subparagraph (a)(1)(A) provides for mandatory representation when a felony or misdemeanor is charged, subparagraph (a)(1)(B) provides for the mandatory representation of those charged with juvenile delinquency, and subparagraph (a)(1)(C) provides for mandatory representation of those alleged to have violated probation. The language of subparagraph (a)(1)(B) has also been changed slightly to conform with the provisions of chapter 403 of title 18, United States Code, - "Juvenile Delinquency."

Subparagraph (a)(1)(E) conforms the language of the CJA to that of the Parole Commission and Reorganization Act of 1976. The new language makes it clear that appointment of counsel under the CJA is mandatory in parole matters when so provided in the Parole Commission and Reorganization Act. (See comments below relating to Section 3 of the bill which further amends the CJA to eliminate references to parole in accordance with the Comprehensive Crime Control Act of 1984 (CCCA), title II, P.L. 98-473, 98 Stat. 1837, October 12, 1984).

Subparagraph (a)(1)(G) makes appointment of counsel mandatory for a material witness who is in custody, and not discretionary as currently provided in subsection (g). The Bail Reform Act of 1984, enacted as chapter I of the CCCA, provided for mandatory representation by appointed counsel at a detention hearing for a financially eligible person arrested as a material witness (See Sections 3144 and 3142 (f) of title 18, United States Code). This requirement is incorporated into the CJA through the operation of current paragraph (a)(2) of the CJA which provides for the furnishing of representation to a person "who is under arrest when such representation is required by law," as well as current paragraph (a)(5) which provides for the representation of a person "for whom, in a case in which he faces loss of liberty, any Federal law requires the appointment of counsel." However, subsection (g) continues to provide discretionary authority for the

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appointment of counsel to represent a material witness in custody and, presumably, encompasses representation at every stage of such proceedings including the giving of a deposition by the material witness. Since the mandatory appointment provision of the Bail Reform Act of 1984 only refers to representation at the detention hearing, it is unclear whether the appointment of counsel to assist material witnesses in custody at depositions remains within the discretion of the presiding judge or magistrate. Amending the CJA to require the appointment of counsel for material witnesses will 1) eliminate any questions concerning the entitlement to representation throughout the material witness proceedings, 2) be consistent with what already is the general practice in a number of districts, and 3) reflect the view of the Judicial Conference that any person held in custody against his or her will, whether as a defendant or one designated by a party as a material witness, should have the assistance of an attorney in exercising all rights provided by law.

Subparagraphs (a)(1)(H) and (a)(1)(I) make no substantive change, but merely separate into two subparagraphs the provision appearing in current paragraph (a)(5).

Paragraph (a)(2) replaces current subsection (g) and lists those cases in which appointment of counsel is discretionary.

Subparagraph (a)(2)(A) is new and permits the appointment of counsel, as a matter of discretion, in petty offense cases where a sentence of confinement is authorized. At present, the language of the CJA excludes appointment of counsel in petty offense cases. However, as a result of two Supreme Court decisions, there are some petty offense cases and situations in which appointment of counsel is now required. In the first decision, Argersinger v. Hamlin, 407 U.S. 24 (1972), the Court held that under the Sixth Amendment to the Constitution an indigent defendant is entitled to appointment of counsel if there is a likelihood of imprisonment. The Court expressly reserved the question of the right to counsel in cases where incarceration is authorized but will not be imposed. Later, in Scott v. Illinois, 440 U.S. 367 (1979), the Supreme Court held that there is no constitutional right to appointed counsel unless imprisonment is actually imposed. In view of the Argersinger and Scott decisions, attorneys are presently being appointed in petty offense cases where there is a likelihood of imprisonment, and compensation is being provided under the authority of paragraph (a)(5) of the Criminal Justice Act, which extends the coverage of the Act to all cases where the Sixth Amendment to the Constitution requires the appointment of counsel.

There remains a practical difficulty however, since a judge or magistrate must predict at the commencement of proceedings whether or not a term of confinement is likely to be imposed. Generally, comparatively little information concerning the facts of the case, aggravating or mitigating circumstances, or the character of the defendant is available to the judicial officer at that time. A decision not to appoint counsel at the preliminary stages of proceedings serves to foreclose incarceration as a sentencing option of the court. Subparagraph (a)(2)(A) would eliminate this problem by permitting judges and magistrates to appoint counsel in petty offense cases

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where incarceration is authorized by statute and they determine that the interests of justice require it. The final decision concerning imposition of a term of confinement could then be reserved until the conclusion of the proceedings. Accordingly, maximum sentencing flexibility would be preserved. (See comments below relating to Section 3 of the bill which further amends the CJA to reflect the new offense classifications created by the CCCA.)

The language of paragraph (a)(3) contains no substantive changes, although it now comprises a separate subparagraph, with stylistic improvements.

(b) Appointment of Counsel

The second sentence is made less cumbersome by the omission of individual references to the category of cases for which a person may be entitled to appointed counsel. The word "person" has been substituted for the word "defendant" in this subsection, and elsewhere in the CJA, to reflect the fact that counsel may be appointed for habeas petitioners and material witnesses as well as for persons charged with a crime.

(d) Payment for Representation

(d)(1) Hourly Rate
(d)(2) Maximum Amounts

The CJA, as enacted in 1964, provided for compensation of appointed counsel at a rate not to exceed $15 per hour for time expended in court, and $10 per hour for time expended out of court. The CJA also provided maximum compensation limits of $500 for felony cases and $300 for misdemeanor cases. The 1970 amendments increased the hourly rate maximums to $30 per hour for time expended in court, and $20 per hour for time expended out of court. Maximum compensation limits were increased to $1,000 for felony cases, and $400 for misdemeanor cases. In addition, new maximums were established -- $1,000 for representation provided on appeal, and $250 for appointment under subsection (g), probation revocation cases, and post-trial motions made after entry of judgment.

The rates and maximums remained at the levels set in 1970 for nearly fourteen years, until the passage of the CJA Revision of 1984 which was enacted as chapter XIX of the CCCA. The CJA Revision of 1984 doubled the hourly rates of attorney compensation by raising the limits to their current levels of $60 per hour for in-court time, and $40 per hour for out-of-court time. In addition, the CJA Revision of 1984 doubled the case compensation maximums.

These compensation increases will provide the courts with, at least, partial relief from the difficulties they have been encountering in recent years in recruiting and retaining qualified private attorneys to serve on their CJA panels. There are, however, serious concerns that 1) in at least some high-cost districts, the new compensation levels continue to be inadequate, and 2) in those districts where the present compensation limits are sufficient, changes in economic conditions in the ensuing years

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will erode the values of these limits and render them inadequate long before Congress legislates additional increases.

Congressional action to increase compensation followed, by seven years, the determination by the Judicial Conference Committee to Implement the CJA that the rate and case compensation maximums had become inadequate and its recommendation that they be increased. It was this delay factor that led to the compensation scheme embodied in H.R. 4307, the Judicial Conference supported CJA revision bill which was introduced in the 98th Congress and passed the House of Representatives, but not the Senate.

The compensation scheme of H.R. 4307 is retained in the new draft bill. It amends paragraph (d)(1) of the CJA to establish a maximum hourly compensation rate of $50, thus eliminating the in-court and out-of-court hourly rate differential and the administrative burdens and expenses associated with it. While the $50 rate represents a decrease from the $60 rate currently applicable to in-court hours, the change is expected to result in a moderate increase in the total amount of compensation available in most cases, since approximately 75% of all hours expended by CJA counsel are for services performed out of court and thus are subject to the $40 per hour limit. On the other hand, the elimination of the need to administer two rates should produce savings.

In addition, the Judicial Conference would be authorized to set a higher maximum hourly rate not to exceed $75, for a particular circuit or district within a circuit, if the Conference determines that circumstances existing in such circuit or district warrant an exception from the general maximum. Further, the Judicial Conference would be authorized to develop guidelines for determining such maximum hourly rates, taking into account such factors as 1) the minimum range of the prevailing rate for qualified attorneys in individual districts, and 2) the recommendation of the judicial councils of the circuits.

The provision for setting an alternate hourly rate would restore at least some of the flexibility and viability which the Congress created when, in 1970, it amended paragraph (d)(1) of the CJA to authorize judicial councils to set alternate hourly rates for districts, "not to exceed the minimum hourly scale established by a bar association for similar services rendered in the district." This goal was subsequently frustrated by the abolishment of minimum bar fee schedules following the decision of the Supreme Court in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), which held that a minimum fee schedule promulgated and enforced by a bar association constitutes unlawful price-fixing in violation of the Sherman Act. The Goldfarb decision thus resulted in a collateral deactivation of the adjustment authority conferred by Congress in the Circuit Councils. In Mills v. United States, 713 F. 2d 1249, (7th Cir. 1983), cert. denied, 104 S.Ct. 974 (1984)), the Court of Appeals for the Seventh Circuit held that, in the absence of a local bar association minimum fee schedule, the Judicial Council for the Seventh Circuit lacked authority to increase the hourly rates payable to attorneys accepting

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appointments under the CJA above the $20 and $30 maximums. While the CJA Revision of 1984 removed the 1970 language authorizing judicial councils to set alternate hourly rates, it made no provision to replace this mechanism for affording flexibility to the CJA compensation scheme.

In addition the draft bill would authorize, but not require, the Judicial Conference to annually increase the $50 and $75 maximums up to the federal pay comparability raises, if any, given to federal employees. Thus, the CJA would include a limited mechanism for administrative adjustment of the compensation rates to provide for fair and reasonable compensation to counsel in light of future changes in economic conditions. This authority would not become operative until three years after the effective date of the proposed legislation.

Finally, in view of the increase in hourly rates, proposed paragraph (d)(2) would increase the overall per-case compensation maximums to $5,000 for felonies, $1,500 for misdemeanors, $3,000 for appeals and $1,000 for any other representation provided under the CJA. Cases falling within subsection (g) of the current law would be included in the new "other representation" category. Also included would be cases brought within the scope of the CJA under subparagraph (a)(1)(I) (current paragraph (a)(5)), as a result of judicial decisions or new Federal statutes which may require the appointment of counsel. The need for this provision was most recently demonstrated by the enactment of the Insanity Defense Reform Act of 1984 (Chapter IV of the CCCA) which amended the CJA to provide for representation at certain mental competency proceedings but failed to include a case compensation maximum for such appointments.

(d)(3) Waiving Maximum Amounts

While amendments to paragraph (d)(2) made by the draft bill allow for some variation among the districts with respect to the maximum hourly rate, and also contain a limited mechanism to permit raises to the hourly maximum to reflect increases in the cost of living, the case compensation maximums established by the new paragraph (d)(2) are limits to be applied in every district and circuit and may not be increased by the Judicial Conference. Thus, attorneys in districts where a higher hourly rate has been established under paragraph (d)(2) may reach the case compensation limit after expending fewer hours than attorneys in districts where the lower hourly rate is in effect. In order to avoid an erosion of the flexibility intended in the compensation scheme set forth in paragraph (d)(2), the standard for waiving the maximum amount has been broadened -- the judicial officers' authority to certify compensation in excess of the maximum would no longer be limited to those cases which are "extended and complex". Under the new standard, the maximum could be waived by the chief judge of the court of appeals upon the certification of the presiding judicial officer that excess payment is necessary to provide "fair compensation".

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The case compensation ceilings would also be effectively lowered if the Judicial Conference approved higher hourly rates based upon federal pay comparability increases. The proposed waiver standard will permit the full realization of the benefits of such adjustments.

(d)(4) Filing Claims

The word "person" has been substituted for "defendant."

(e) Services Other Than Counsel

(e)(1) Upon Request

The phrase "adequate representation" has been inserted in lieu of "an adequate defense".

(e)(2) Without Prior Request

The modest increase from $150 to $300 as the amount which may be incurred for expert services without prior authorization takes into account the dramatic increase in the cost of these services which has occurred since this limit was established in 1970. In addition, paragraph (e)(2) has been split into subparagraphs (A) and (B). Subparagraph (A) is substantially identical to current paragraph (e)(2), the exception being the substitution of "representation" for "defense", the increased dollar limitation, and the reference to subparagraph (B). Subparagraph (B) is a new provision which allows the judge or magistrate to approve a claim for investigative, expert, or other services obtained by appointed counsel, even though prior authorization has not been secured and the amount of the claim exceeds the new limit established by subparagraph (A). However, subparagraph (B) would limit the discretion of judicial officers to provide this ratification to those circumstances where "timely procurement of the necessary services could not await prior authorization".

(e)(3) Maximum Amounts

The $300 limit contained in the present Act has not been changed since the CJA was enacted in 1964. The proposed bill raises the limit to $1,000, a more realistic figure in view of the increase in fees charged by investigators and experts during the nearly twenty-one years since the current limit was established.

(g) Discretionary Appointments (Deleted); Redesignations

Current subsection (g) has been deleted and is found in new paragraph (a)(2), and current subsections (h) through (l) have been redesignated as subsections (g) through (k), respectively.

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(g) Defender Organization (currently subsection (h))

(g)(2) Types of Defender Organization

This paragraph contains two minor stylistic revisions.

(g)(3) Malpractice and Negligence Suits (new)

This paragraph is intended to provide protection for employees of federal public and community defender organizations who face lawsuits alleging legal malpractice and negligence arising out of their performance of representational services within the scope of their employment. Since the Supreme Court's decision in Ferri v. Ackerman, 444 U.S. 193 (1979), there has been serious concern about the impact on the federal defender program of the potential exposure of employees of federal defender organizations to personal liability for legal malpractice claims. Paragraph (g)(3) would give the Director of the Administrative Office of the United States Courts explicit statutory authority to either provide representation and indemnification, or liability insurance for employees of federal public and community defender organizations. The language of this provision is similar to current statutory authorities for insulating personnel against personal liability for medical malpractice. See 10 U.S.C. Sec. 1089; 38 U.S.C. Sec. 4116; and 42 U.S.C. Sec. 233.

(i) Appropriations (currently subsection (j))

At the present, the training and education of federal public defenders is provided through the Federal Judicial Center as part of its general training program for all members and employees of the Federal Judiciary. The amendment to this subsection is intended to specifically designate funds through the defender budgetary process for the continuing education and training of federal defenders and their staffs as well as for private counsel on the CJA panels. It will permit separate, flexible, and long-term planning for defender training which is more comparable to that provided United States attorneys. This amendment will further enhance cooperation between federal defenders and the private bar and facilitate their continuing efforts to improve the quality of representation in the federal courts. At present, Federal Judicial Center training programs for federal defenders are generally not open to CJA panel attorneys and there is no other federally sponsored program for training panel attorneys. This amendment would not preclude an inter-agency agreement with the Federal Judicial Center to take advantage of efficiencies and economies in the administration of these educational programs.

The training of CJA panel attorneys as well as federal defenders is of paramount importance in light of the need for the improvement of advocacy in the federal courts recognized in the report of the Committee of the Judicial Conference of the United States to Consider Standards for Admission to Practice in the Federal Courts. It is believed that making training funds available in this manner will provide the needed flexibility in the area of training and continuing education to increase the overall effectiveness of federal defenders and CJA lawyers.

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(j) Districts Included (Currently Subsection (k))

This subsection has been amended to expressly provide that the District Court for the Northern Mariana Islands is a district court within the meaning of the CJA. A parallel provision currently appears in 48 U.S.C. 1694c (b), thus the change is merely a conforming revision. In addition, the subsection has been reworded for purposes of style.

(k) Applicability in the District of Columbia (Currently Subsection (l))

This subsection would give the United States District Court for the District of Columbia the option of establishing a federal defender organization.

SECTION 3 provides conforming amendments which will be required when the major part of the Sentencing Reform Act of 1984 (chapter II, Comprehensive Crime Control Act of 1984) becomes effective on November 1, 1986. These include technical amendments to reflect changes in offense classifications as well as the elimination of parole.

SECTION 4 amends 28 U.S.C. Section 1825 to authorize federal public defenders and other counsel appointed under the CJA to certify the payment of defense fact witness fees in federal criminal cases. The current language of this section provides that in any case in which the United States is a party (which includes all federal criminal cases) the United States attorney, or an assistant United States attorney, must certify the claims of witnesses for the payment of fees. This requirement applies to witnesses whether they are appearing on behalf of the government, or on behalf of a defendant or petitioner for whom CJA services are authorized.

The practice of having prosecutors certify the payment of defense witness fees poses the potential for conflicts of interest for the U.S. attorneys, as well as additional administrative burdens.

The amendment to the witness fee certification statute will authorize federal public defenders and their assistants to certify the payment of defense fact witness fees in those cases where representation is provided by federal public defenders or their assistants. In those cases where representation is furnished by other counsel appointed under the CJA -- private panel attorneys or attorneys furnished by a community defender organization -- defense fact witness fees would be certified by the court upon the affidavit of the witnesses' attendance by the appointed attorney. In each case, the appearance of the defense witness would be pursuant to a subpoena issued upon approval of the court.

The proposed revision of the procedures for certifying defense fact witness fees has had the support of the Department of Justice in the past two Administrations.

SECTION 5 provides that the Act and amendments made by sections 2, 3, and 4 of the Act shall take effect on October 1, 1985, or 120 days after enactment, whichever is later.

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APPENDIX 3

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August 26, 1985

The Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts, Civil
Liberties and the Administration of Justice
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Re: H.R. 3004

Dear Mr. Chairman:

This letter is in response to your kind invitation to the National Association of Former United States Attorneys ("NAFUSA"), to submit comments on H.R. 3004, the "Criminal Justice Act Revision of 1985."

The National Association of Former United States Attorneys has a membership of nearly 250. We include in our membership some former top officials in the Department of Justice, including Deputy Attorneys General and Assistant Attorneys General. The organization is strictly bipartisan -- the membership consists of appointees from both Democratic and Republican Administrations. Our membership includes persons who served as United States Attorneys as much as twenty-five to thirty years ago, although the bulk of our membership served in the late 1960's, the 1970's, and the early part of this decade.

As your letter notes, NAFUSA testified in support of the revision of the Criminal Justice Act (H.R. 3233/H.R. 4307). At that time, the focus of the revision was on an increase in the compensation paid to attorneys under the Criminal Justice Act, particularly in view of the inordinate period of time that had elapsed since the last increase in rates in 1970. Despite the increases in compensation provided for in the Criminal Justice Act Revision of 1984, NAFUSA supports the proposed increases

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in compensation for attorneys under the Criminal Justice Act provided for in H.R. 3004. This applies to the specific maximums and to the change in the hourly rate. It also applies to the proposed legislation designed to give flexibility in certain high-cost areas to permit compensation to be raised to a maximum of $75.00 an hour. Finally, we also agree with the proposal that would, after three years, authorize the Judicial Conference to increase periodically the proposed $50.00 and $75.00 hourly maximums by an amount not exceeding federal pay comparability factors, if any, granted to federal employees.

In anticipation of presenting our written views, a poll was taken of our membership concerning the proposed increases. More than one-third of our membership responded to the poll, a high response rate. Of those who responded, 90% favored the proposed increases. Given the varying backgrounds of our membership, in terms of times during which they served as United States Attorneys, the fact that our membership is geographically dispersed throughout the country and comes from rural, suburban, and urban areas, this extremely high percentage reflects the widespread support within the organization for the proposed increases. Very few of our membership regularly accept appointments under the Criminal Justice Act. Consequently, our members' position is not influenced by our self-interest but instead by our judgment of what is fair and reasonable for attorneys who provide these important services.

H.R. 3004 proposes to eliminate the present difference between in-court and out-of-court rates, presently set at $60.00 and $40.00 per hour respectively, and to substitute in their place a uniform rate of $50.00 per hour. There are some arguments which do support the difference in the rates: these include greater skills demanded of in-court work and physical demands on the attorney. They also include the difficulty in monitoring out-of-court time. NAFUSA does not view the decision to have a uniform compensation rate as a means for increasing overall attorney compensation. If the goal is to increase compensation, it should be done directly. Justification for providing a uniform rate is that a uniform hourly rate is more reflective of current legal practice. Also, it should also ease the administrative burden in providing attorneys the compensation they have earned.

NAFUSA also believes it makes sense to authorize the Judicial Conference to establish a higher maximum hourly rate, not to exceed $75.00, for a particular circuit or district within a circuit, if the Conference determines that circumstances justify an exception from the $50.00 maximum.

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The Judicial Conference has advised that guidelines will be set for determining such hourly rates. Assuming institution of such guidelines and their application depending on the needs of the particular district or circuit, the authorization to provide the higher maximum hourly rate should operate to attract competent attorneys in districts that have higher costs of living and corresponding higher rates for attorney's fees.

NAFUSA also supports increase in the maximums allowed for the different kinds of cases. Increases were provided in the Criminal Justice Act Revision of 1984, increases that were long overdue. Although a significant improvement, the maximums are still below what they should be. The proposed amounts in H.R. 3004, $5,000.00 for a felony, $1,500.00 for a misdemeanor, $3,000.00 for an appeal and $1,000.00 for other cases for which the Act requires appointment of counsel, are well within reasonable limits and are supported by NAFUSA.

We also support the increases provided in H.R. 3004 for obtaining investigative and expert services without prior authorization and with prior authorization, $300.00 without prior authorization and $1,000.00 with prior authorization. Investigative and expert services are frequently critical for providing effective assistance of counsel to an accused. The existing limits are simply too low for their essential services. The new limits represent a substantial improvement that should not in any way be considered overly generous. To the contrary, they are at a minimum level.

H.R. 3004 also authorizes the Director of the Administrative Office to provide professional liability insurance for defenders who provide representation and indemnification. Attorneys in these offices should not have to pay for the protection from their own salaries. Malpractice insurance rates are skyrocketing and, therefore, the Administrative Office will have to exercise considerable care with respect to the insurance it provides. However, the concept is desirable. The alternative suggestion that public and community defenders be covered under the Federal Tort Claims Act does not seem objectionable to NAFUSA because of the alleged conflict of interest of the Department of Justice/U.S. Attorneys Office representing the public or community defender. In effective assistance of counsel cases, defended by Justice or U.S. Attorneys, the principal witness they have relied on is frequently the former defense attorneys. The difference of the defense attorney as witness or party litigant does not appear that significant. The important consideration, however, is

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that the attorneys and organizations have some form of coverage or protection.

Education and training of persons who provide legal services for indigent persons accused of crime represent dollars well-spent. Care must be taken to prevent abuses and assure the most effective use of funds, but again the concept is sound and NAFUSA supports it. We also support the provision that would relieve the United States Attorney's Offices from the responsibility of certifying payment of defense fact witnesses in federal criminal cases. Prosecutors are generally not in a position to evaluate the appropriateness or amount of the payments and therefore should not have that responsibility.

I wish to bring one further point to your attention although here the views are not those of NAFUSA but of the undersigned alone. This concerns the authorization in H.R. 3004 to permit establishment in the District of Columbia of a federal defender organization. The comments below should not be construed to oppose this provision but only to express a concern about its implementation. In 1970, Congress created a Public Defender Service for the District of Columbia, a service which was intended to provide outstanding legal service for indigent accused in both the Article I and Article III courts. That Public Defender Service did so for many years and developed an admirable tradition of excellence. In recent years, however, its services have focused almost exclusively in the Superior Court of the District of Columbia, perhaps as a result of the fact it is now funded by the District of Columbia. The District of Columbia has continually benefitted for many years from the fact that it has a United States Attorney serving as prosecutor for both "local" and "federal" crimes and who therefore has an opportunity to provide a more comprehensive and efficient response to the problems of crime. It would be regrettable to have to duplicate the services of an outstanding public defender organization in a small geographical area such as the nation's capital and thereby have separate organizations, both supported by the public, serving federal courts. The duplication of training and education and providing of expert services would be inevitable and wasteful. If these services are presently unavailable for the accused in the Article III courts in the District of Columbia, it would be preferable under the provision in H.R. 3004 permitting establishment of a federal defender organization to have it part of or related to the present Public Defender Service in such a way that coordinated service could be provided in both the Article I and Article III courts in the District of Columbia. To have two entirely unrelated, separate organizations is unnecessary.

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In behalf of NAFUSA, I wish to express my gratitude to you and other members of your Committee for providing us the opportunity to submit our views to you on H.R. 3004.

Sincerely,

Earl J. Silbert

Earl J. Silbert

EJS/ab

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American Bar Association

September 27, 1985

Honorable Robert W. Kastenmeier
Chairman
Subcommittee on Courts, Civil Liberties
and the Administration of Justice
Room 2137
Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman:

The American Bar Association supports provisions of H.R. 3004 that would authorize the Judicial Conference of the United States to administratively raise the hourly compensation paid to attorneys through the Criminal Justice Act of 1964.

This position was adopted as Association policy in February 1982. A copy of the relevant resolution and its accompanying report are enclosed.

Since the Criminal Justice Act was enacted in 1964, the statutorily established hourly compensation has been raised only twice - in 1970 and 1984. Replacing the rigid statutory rate with an administratively determined rate, through a system such as that outlined in H.R. 3004, would eliminate the long hiatus between rate revisions. It will help guarantee the Act's continuous effectiveness since the rate will be periodically adjusted as needed, and thereby a high caliber of counsel will be encouraged to make their services available.

Moreover, reasonable limits are set on the discretion of the Judicial Conference to raise the rate. Raises are limited to not more than one each year and are tied to adjustments in the rates of pay under the General Schedule.

H.R. 3004 raises the maximum amount of compensation allowed for each attorney in a case. However, it perpetuates this rate as a statutorily established amount. The American Bar Association would prefer that the maximum amount of compensation for each case also be set administratively. An amendment to the bill that would provide such a provision would complement the hourly rate provisions and enhance the Act's flexibility to meet inflationary conditions.

The Subcommittee's consideration of the Association's views on H.R. 3004 will be most appreciated.

Sincerely yours,

Robert D. Evans

RDE/tcs
Enclosure
cc: Members of the Subcommittee

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ABA APPROVED
FEBRUARY, 1982

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AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION
AND
STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS

REPORT TO THE
HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, That the American Bar Association urges the Congress of the United States to increase, or provide a mechanism for administratively increasing, the per hour and maximum total amount of compensation authorized under the Criminal Justice Act of 1964 so that the attorneys receive reasonable compensation in accordance with prevailing standards.

REPORT

Right of Indigents to Appointed Counsel in Criminal Cases

The Sixth Amendment to the United States Constitution provides, "in all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense." The Supreme Court applied this constitutional requirement in Powell v. Alabama, 287 U.S. 45 (1932). The Court restricted its ruling in Powell to the limited circumstances of that case stating, "All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to

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assign counsel for him as a necessary requisite of due process of law..."[1] Therefore, although the ruling in Powell articulated a defendant's right to counsel, it did not specifically mention financial need as a circumstance warranting the appointment of counsel. However, in dicta contained in the Powell case the Court did allude to financial circumstances as criteria to be considered. That dicta states, "The United States by statute and every state in the Union by express provision of law, or by the determination of its courts, make it the duty of the trial judge, where the accused is unable to employ counsel, (emphasis added) to appoint counsel for him. In most states the rule applied broadly to all criminal prosecutions, in others it is limited to the more serious crimes, and in a very limited number, to capital cases. A rule adopted with such unanimous accord reflects, if it does not establish, the inherent right to have counsel appointed, at least in cases like the present, and lends convincing support to the conclusion we have reached as to the fundamental nature of that right."[2]

The Court was not long in formally recognizing that financial inability to retain counsel is constitutional grounds to mandate that counsel be appointed. In Johnson v. Zerbst, 304 U.S. 458 (1938) presented an instance where "...the accused were unable to employ counsel for their trial."[3] The Court concluded, "Since the Sixth Amendment constitutionally entitles one charged with a crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty." "A court's jurisdiction at the beginning of trial may be lost 'in course of the proceedings' due to failure to complete the court - as the Sixth Amendment requires - by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake."[4]

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1. Powell v. Alabama, 287 U.S. 45 at 71 (1932)
2. Id. at 73
3. Johnson v. Zerbst, 304 U.S. 458 at 460 (1938)
4. Id. at 467 and 468

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Case Law on Providing Compensation for Appointed Counsel

Although the Supreme Court has spoken to the right of defendants to have counsel appointed to represent them in criminal cases when they cannot afford to retain counsel, it has not addressed the issue of the right of counsel to be compensated when appointed to represent an indigent defendant. Nevertheless, a number of state court decisions can be cited as supporting the proposition that appointed counsel should be adequately compensated.

The reasoning of the courts in these cases is based on a recognition of the increasing complexity of criminal cases and the rising volume of cases. (See State v. Rush, 46 N.J. 399, 217 A2d. 441 (1966) and People v. Randolph, 35 Ill. 2d 24, 219 N.E. 2d 337 (1966)). The right to compensation has also been based on constitutional grounds. In Bradshaw v. Ball, 487 S.W.2d 294 (1972), the Court of Appeals of Kentucky held:

> "It is in the public interest that the administration of criminal justice proceed fairly, impartially, expeditiously and efficiently. Therefore it appears elemental that the public interest in the enforcement of criminal laws and the constitutional right of the indigent defendant to counsel can be satisfied only by requiring the state to furnish the indigent a competent attorney whose service does not unconstitutionally deprive him of his property without just compensation."[5]

ABA Standards on Compensation for Appointed Counsel

In addition to decisions of state courts, Standards of the American Bar Association call for compensation of appointed counsel. Standard 7.22 of the Standards Relating to Trial Courts produced by the ABA Commission on Standards of Judicial Administration provides, "Counsel for persons entitled to assistance of counsel should be provided through a systematic plan that is sufficiently funded to provide qualified and independent counsel, adequately compensated and supplied with necessary supporting services." The Commentary to this standard elaborates, "....(T)he quality of representational services is very largely dependent on the level of funding provided for them. The judiciary should encourage legislatures to provide for needed authority, organization, and funding."

The ABA Standards for Criminal Justice address the matter of compensation for counsel in a more direct manner. "Assigned counsel should be compensated for time and service performed. The objective should

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5. Bradshaw v. Ball, 487 S.W.2d. 294 at 299 (1972)

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be to provide reasonable compensation in accordance with prevailing standards." (Standard 5-2.4). This Standard implements the concept of Standard 5-2.1 which states, "Government has the responsibility to provide adequate funding for legal representation of all eligible persons..." This same principal is found in Standard 22-4.3(a). That Standard recognizes, "When private attorneys are appointed to represent applicants, their services should be compensated from public funds."

The ABA Standards are not the only source that has recognized the assigned counsel should be compensated. The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts (1967) not only recognized the need to compensate counsel, but also advocated compensation that would equal that received by a paying client. To this end, the Task Force stated:

> "Assigned counsel should be paid a fee comparable to that which an average lawyer would receive from a paying client for performing similar services. Most presently proposed standards for compensation of assigned counsel call for a fee which is less than could be commanded in private practice. It has been argued that these standards are sufficient because it is part of a lawyer's obligation as a member of the bar to contribute his services to the defense of the poor. But these standards unavoidably impose a stigma of inferiority on the defense of the accused...[I]t is undesirable to perpetuate a system in which representation for the poor seems to be obtained at a discount."[6]

The Criminal Justice Act of 1964

Congress has recognized the need to provide compensation for appointed counsel in criminal cases. To this end, it enacted the Criminal Justice Act of 1964, "(r)ecognizing that defendants often did not have the resources to obtain counsel..."[7] "This compensation was intended to ease the financial burden on the attorney, who offers his services to a defendant as a professional public duty."[8] In Ferri v. Ackerman, 444 U.S. 193 (1979) the Supreme Court looked deeper into the motivation for enacting the Criminal Justice Act and found that it was passed "(i)n response to evidence

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6. Task Force on the Administration of Justice, President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts p.61 (1967)

7. H.R. Rep. No. 91-1546, 91st Cong., 2d Session, reprinted in 1970 U.S. Code Cong. & Ad. News 3982, 3984

8. Id.

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that unpaid appointed counsel were sometimes less deligent or less thorough than retained counsel[9]...and therefore "Congress concluded that reasonable compensation would improve the quality of the representation of indigents."[10] Unfortunately, the rate of compensation provided by the Act is far less than reasonable.

The rate of compensation is set by 18 U.S.C. §3006A(d)(2). It was last changed by Congress in 1970. Since that time, the Consumer Price Index has risen 100 percent. At the present time, the maximum compensation may not exceed $1,000 for a felony case and $400 for a misdemeanor case. The hourly rate is set at $30 per hour for time expended in court and $20 per hour for time expended out of court.

Not only is the hourly rate of compensation inadequate, but the maximum total compensation allowable is a further handicap to fair and equitable reimbursement for services rendered by appointed counsel. These fees are "...often 25 percent of similar private cases, and in some cases their effort is not reimbursable at all."[11] The Act does provide for payment in excess of the maximum amount "...whenever the court in which the representation was rendered...certifies that the amount of the excess payment is necessary to provide fair compensation and the payment is approved by the chief judge of the circuit."[12] As a practical matter, however, authorization for payments in excess of the maximum are rarely granted. "For example, in 1978, of nearly 22,000 private appointments, excess compensation was granted in only 313 felony cases and about 60 others."[13]

This disparity in the compensation between the private sector and appointed counsel raises questions about the continued willingness of competent counsel to participate in the defense of indigent clients. The Supreme Court in the case of Ferri v. Ackerman, 444 U.S, 193 (1979) recognized that there might be a need to adjust the level of compensation "to preserve the supply of lawyers available for this important work."[14] However, the Court stopped short of unequivocally endorsing a raise in the compensation stating that it was a question "...that can most appropriately be answered by a legislative body acting on empirical data."[15]

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9. Ferri v. Ackerman, 444 U.S. 193 at 193

10. Id.

11. Branda, Criminal Justice Act of 1964. State Malpractice Suit Against Appointed Counsel, 13 Akron L. Rev 745 at 753 (1980)

12. 18 U.S.C. §3006A(d)(3)

13. Mulligan, Court-Appointed Defense Lawyers Unshielded from Malpractice Suits, The National Law Journal, Feb. 2, 1981, at 25

14. Ferri, Supra note 1 at 205

15. Id.

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This concern over the continued willingness of counsel to accept appointments under the Criminal Justice Act at the present rates of compensation has prompted the ABA formulate the recommendation that is the subject of this report. The recommendation recognizes that Congress may continue the present means of designating the rate of compensation and maximum permissible amount of compensation by statute, or may choose instead to allow the compensation to be set administratively (e.g. by the Criminal Justice Act Division of the Administrative Office of the Courts). Providing for administratively established rates and maximum amounts of compensation has the advantage of permitting periodic adjustments that may be necessary in these times of rapid inflation.

Regardless of the method chosen by Congress to provide for an adjustment in compensation provided under the Criminal Justice Act, it is important that some remedy be enacted to preserve the integrity and purposes for which the Act was passed. "Clearly, indigency should not be a factor in the scheme of criminal justice. To the extent that the Criminal Justice Act was an attempt to achieve that goal, it is a laudable and important law; but its effectiveness in achieving that goal may be seriously eroded if able trial counsel conclude that appointments are too severe an imposition upon their time with too little remuneration."[16]

There is concern that the existing paltry sums provided by the Criminal Justice Act for compensating appointed counsel may have an effect on adequately providing to indigents their right to effective assistance of counsel. This concern is based on the notion that more experienced and capable counsel will not accept appointments to represent indigents under the Criminal Justice Act unless they receive a reasonable amount of compensation. This concern was one of the factors that lead Congress to raise the existing rates in 1970. That decision was preceded by an extensive study of the matter.

At the time the 1970 amendments were approved the Congress relied on a report prepared by Professor Dallin H. Oaks of the University of Chicago Law School. This report was commissioned by the Department of Justice through its Office of Criminal Justice and the Judicial Conference of the United States through its Committee to Implement the Criminal Justice Act. Although the study of Professor Oaks dealt mainly with the question of a Federal public defender system, it also addressed the question of whether the level of compensation affects the quality of representation provided by appointed attorneys under the Criminal Justice Act. It was the conclusion of the Oaks Report "...that the single most important factor in determining the quality of service under the Criminal Justice Act is the degree of experience of the C.J.A. lawyers being appointed in the district."[17] The report determined that "...the availability of compensation and other resources under the Criminal Justice Act can be of great significance in aiding the

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16. Mulligan, supra

17. Oaks, The Criminal Justice Act in the Federal District Courts - A Summary and Postcript, 7 Am. Crim. L. J. 210 at 222 (1968-69)

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district court in making better use of its own resources, including principally the experience of its Bar..."[18] Of course, compensation alone "...does not itself guarantee better quality criminal defense."[19]

The concerns about the level of compensation and its effect on the quality of representation that were, in part, the impetus for amendment of the Criminal Justice Act in 1970 are again being expressed. In U.S. v. Quintero-Medina, 489 F. Supp. 82 (1980) the court stated:

> "Lawyers who devote their substantial talents to the defense of indigent persons accused of crime are entitled to equal treatment. Unfortunately the Congress has placed and retained an unreasonably low limit on the rate at which these lawyers may be compensated from public funds. But certainly all of their time should be compensated at those low rates, when close scrutiny of that time reveals it was reasonably and necessarily spent on the defense of the assigned, indigent defendant. To do less would be to relegate those who defend persons accused of crime to a second class status and to fail in our statutorily implemented Sixth Amendment commitment to the indigent accused that they will receive professional representation of a quality comparable to that available to those who are able to retain experienced, able counsel"[20]

The courts are not alone in their concern about the level of compensation. A report of the New York County Lawyers' Association published in September 1981 found, "...the compensation rates which were fixed in 1971 have become nominal in light of the severe intervening inflation and there is concern that this could have an adverse effect upon the degree of thoroughness with which legal services are rendered. Thus, we also express the hope that Congress will bring the rates of compensation up to reasonable levels." The National Association of Former United States Attorneys acting at its 1980 Annual Convention adopted a resolution urging "...that the United States Congress promptly adopt legislation...to increase the levels of compensation for attorneys appointed to represent indigent defendants and to remove the maximum limitation on compensation presently provided under the Criminal Justice Act."

The Board of Governors of the State Bar of Wisconsin also adopted a resolution on August 21, 1981. This resolution was offered in support

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18. Id.

19. Id.

20. U.S. v. Quintero-Medina, 489 F.Supp. 82 at 85 (1980)

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of draft legislation that would provide for establishing a rate "...to provide reasonable compensation to attorneys providing representation under the (Criminal Justice) Act." That resolution cited as the reasons for its findings the fact that "existing hourly rates and maximum levels of compensation are clearly inadequate and result in an unfair burden upon those attorneys who represent defendants in federal criminal cases," "the Speedy Trial Act has increased this burden by requiring accedited trials of federal criminal cases," "federal criminal cases have become more complex and their defense, including trial, more protracted," and "difficulties have been encountered by the courts in obtaining attorneys willing to accept appointments under the Criminal Justice Act."

The Section of Criminal Justice and Standing Committee on Legal Aid and Indigent Defendants join these organizations and others that have expressed their concerns about the level of compensation and maximum rate of compensation provided to attorneys who are appointed under the Criminal Justice Act of 1964 to represent indigent defendants in criminal cases. To this end, it has adopted the Recommendation that is the subject of this report.

Respectfully submitted

Sylvia Bacon
Chairperson
Criminal Justice Section

Robert D. Raven
Chairman
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And Indigent Defendants

January, 1982

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